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No. 80-860

In the Supreme Court of the United States.

OCTOBER TERM, 1980.

OUIMET CORPORATION, OUIMET STAY & LEATHER COMPANY, OUIMET WELTING COMPANY, EMIL R. OUIMET WAREHAM TRUST, AVON SOLE COMPANY, TENN-ERO CORPORATION AND HERBERT KAHN, TRUSTEE,

PETITIONERS,

v.

PENSION BENEFIT GUARANTY CORPORATION AND UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, SOLOMON REDDIX AND ALEX WILLIAMS,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petition for Writ of Certiorari.

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Questions Presented.

1. Whether Congress imposed under the provisions of the Employee Retirement Income Security Act of 1974 (*ERISA*), 88 Stat. 829, 29 U.S.C. § 1001 *et seq.*, and, if so, did it violate the Due Process Clause of the Fifth Amendment to the United States Constitution by imposing, joint and several liability on members of a controlled group of corporations to fund a lawfully terminated pension plan contracted for and maintained by one of its bankrupt members?

2. Whether the decision of the United States Court of Appeals for the First Circuit erroneously imposed liability on two bankrupt corporations, neither of whom had any positive net worth, contrary to the wording and intent of ERISA?

3. Assuming *arguendo* that Congress did have the constitutional power to so impose joint and several liability on members of a controlled group of corporations, was Pension Benefit Guaranty Corporation's denial of a waiver of such liability as permitted by § 4004(f)(4) of ERISA, 29 U.S.C. § 1304(f)(4) "arbitrary, capricious [and an] abuse of discretion"?

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Petition for Writ of Certiorari.

Opinion Below.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the United

States District Court for the District of Massachusetts, which was affirmed by the Court of Appeals, appears at 470 F. Supp. 945. The opinion and order of the Bankruptcy Judge, Bankruptcy Nos. 75-1520-HL, 75-1521-HL (D.C. Mass. May 13, 1977) are unreported but appear in the Appendix hereto.

Statement of Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was delivered and entered on August 29, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved.

UNITED STATES CONSTITUTION, ARTICLE I, § 10

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts.

UNITED STATES CONSTITUTION, AMENDMENT V

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

INTERNAL REVENUE CODE OF 1954

Section 414

(b) EMPLOYEES OF CONTROLLED GROUP OF CORPORATIONS. — For purposes of sections 401, 408(k), 410, 411 and 415, all employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a), determined without regard to section 1563(a) (4) and (e) (3) (C)) shall be treated as employed by a single employer. With respect to a plan adopted by more than one such corporation, the minimum funding standard of section 412, the tax imposed by section 4971, and the applicable limitations provided by section 404(a) shall be determined as if all such employers were a single employer, and allocated to each employer in accordance with regulations prescribed by the Secretary.

(c) EMPLOYEES OF PARTNERSHIPS, PROPRIETORSHIPS, ETC., WHICH ARE UNDER COMMON CONTROL. — For purposes of sections 401, 408(k), 410, 411 and 415, under regulations prescribed by the Secretary, all employees of trades of businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer. The regulations prescribed under this subsection shall be based on principles similar to the principles which apply in the case of subsection (b).

TITLE IV OF ERISA § 4001(b), 29 U.S.C. § 1301(b)

An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of

each partner who is an employee within the meaning of section 401(c) (1) of the Internal Revenue Code of 1954. For purposes of this title, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of the Internal Revenue Code of 1954.

TITLE IV OF ERISA § 4004(f), 29 U.S.C. § 1304(f)

In addition to its other powers under this subchapter, for only the first 270 days after the date of enactment of this Act [September 2, 1974] the corporation may —

. . . . . .

(4) waive the application for the provisions of sections 4062, 4063 and 4064 to, or reduce the liability imposed under such sections on, any employer with respect to a plan terminating during that 270 day period if the corporation determines that such waiver or reduction is necessary to avoid unreasonable hardship in any case in which the employer was not able, as a practical matter, to continue the plan.

TITLE IV OF ERISA § 4062, 29 U.S.C. § 1362

(a) This section applies to any employer who maintained a plan (other than a multiemployer plan) at the time it was terminated. . . .

(b) Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of —

(1) the excess of —

(A) the current value of the plan's benefits guaranteed under this title on the date of termination, over

(B) the current value of the plan's assets allocable to such benefits on the date of termination, or

(2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

. . . . . .

(d) For purposes of this section the following rules apply in the case of certain corporate reorganizations:

(1) If an employer ceases to exist by reason of a reorganization which involves a mere change in identity, form, or place of organization, however effected, a successor corporation resulting from such reorganization shall be treated as the employer to whom this section applies.

(2) If an employer ceases to exist by reason of a liquidation into a parent corporation, the parent cor-

poration shall be treated as the employer to whom this section applies.

(3) If an employer ceases to exist by reason of a merger, consolidation, or division, the successor corporation or corporations shall be treated as the employer to whom this section applies.

. . . . . .

TITLE IV OF ERISA § 4064, 29 U.S.C. § 1364

(a) This section applies to all employers who maintain a plan under which more than one employer makes contributions at the time such plan is terminated, or who, at any time within the 5 plan years preceding the date of termination, made contributions under the plan.

(b) The corporation shall determine the liability of each such employer in a manner consistent with section 4062 except that the amount of the liability determined under section 4062(b) (1) with respect to the entire plan shall be allocated to each employer by multiplying such amounts by a fraction —

(1) the numerator of which is the amount required to be contributed to the plan by each employer for the last 5 plan years ending prior to the termination, and

(2) the denominator of which is the total amount required to be contributed to the plan by all such employers for such last 5 years,

and the limitation described in section 4062(b)(2) shall be applied separately to each employer. The corporation may also determine the liability of each such employer on

any other equitable basis prescribed by the corporation in regulations.

ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706(1) AND (2)(A)

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .

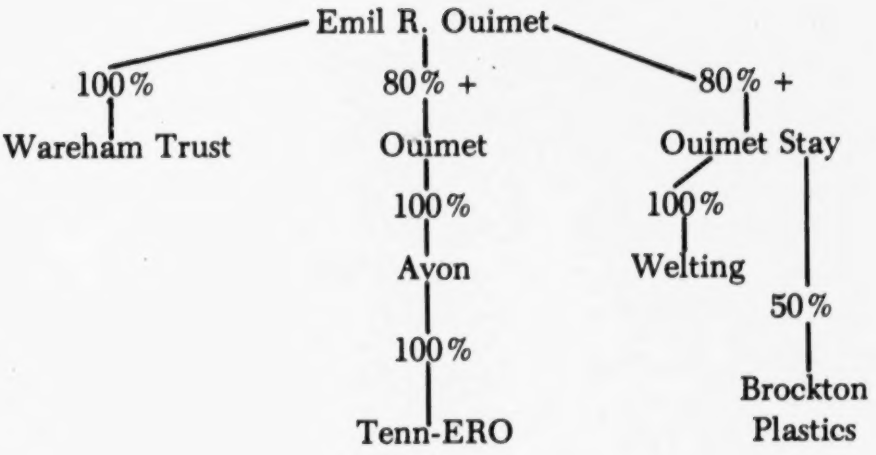
Statement of the Case.

In 1959, Avon Sole Company (*Avon*) entered into a Retirement Plan Agreement as part of its collective bargaining agreement with its union to create the Avon Plan for the benefit of its union employees. Thereafter, Avon paid the salaries and benefits to its employees required under its collective bargaining agreement, including contributions under and to the Avon Plan. Avon's obligations were set forth in its agreement and the Avon Plan satisfied all requirements of the Internal Revenue Code of 1954 for deductibility of the contributions and for the tax exemption of trust created thereunder. In addition, the Avon Plan gave Avon "the right to amend, modify, suspend or terminate the Plan" and limited the benefits pay-

able on termination of the Plan to "the assets of the Retirement Fund," with Avon having "no liability or obligations . . . to make any contribution or payment to establish or maintain the Plan, whether in event of termination of the Plan or otherwise."

In September 1968 Ouimet Corporation (*Ouimet*), a Delaware corporation, acquired all of the stock of Avon, some nine years after the Avon Plan was established. At the time of acquisition the Avon Plan was in effect, continued to be qualified under the Int. Rev. Code of 1954, and was underfunded. Also at the time of acquisition, Ouimet operated a manufacturing facility in Nashville, Tennessee. In 1973, Avon formed a wholly-owned subsidiary, Tenn-ERO Corporation (*Tenn-ERO*), to manufacture its product line in a new and different plant in Tennessee.

At all times relevant to this case, Ouimet owned 100% of the stock of Avon which owned 100% of the stock of Tenn-ERO. Ouimet Stay & Leather Company (*Ouimet Stay*) owned 100% of the stock of Ouimet Welting Company (*Welting*), a dormant corporation, and 50% of the stock of Brockton Plastics Company (not a member of the controlled group). Emil R. Ouimet, an individual, owned in excess of 80% of the outstanding stock of Ouimet and Ouimet Stay, and owned 100% of Wareham Trust. Such stock ownership is shown as follows:



Following the 1968 acquisition of Avon, Ouimet and Avon filed consolidated federal income tax returns and, beginning in 1973, Tenn-ERO joined as a member of the affiliated group in the consolidated return (*Ouimet Affiliated Group*). The Emil R. Ouimet Wareham Trust (*Wareham Trust*), a Massachusetts trust with transferable shares, and Ouimet Stay & Leather Company (*Ouimet Stay*) were members of the controlled group of corporations, as defined in § 1563(a) of the Int. Rev. Code of 1954, which required *inter alia* the apportionment of the $25,000 surtax exemption among the members of the controlled group. However, neither Ouimet Stay and its affiliates nor Wareham Trust were members of the Ouimet Affiliated Group and therefore could not and did not join with Ouimet, Avon and Tenn-ERO in the filing of a consolidated income tax return.[1]

In 1974 Avon experienced severe financial difficulties with the result that in 1975 it closed its only plant located in Massachusetts. Also as a result of these financial difficulties, Avon

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[1] The Court of Appeals erroneously stated to the contrary in its Opinion. ____ F.2d ____ (App. 1a).

terminated the Avon Plan on March 25, 1975. ERISA became law on September 2, 1974. Under the ERISA formula, the Avon Plan was determined to have a deficiency in assets of some $552,000 to fund the ERISA insured benefits under the Avon Plan. Thereafter, Avon and Tenn-ERO Corporations, were adjudicated bankrupt.

Pension Benefit Guaranty Corporation (*PBGC*) originally determined that Avon "was the employer who maintained the Plan" and therefore was liable under ERISA § 4062 for the underfunding. PBGC filed a proof of claim for the alleged underfunding on February 6, 1976. Thereafter, as a result of further investigation, PBGC determined Avon, Tenn-ERO, Ouimet, Ouimet Stay, Welting and Wareham Trust were to be "treated as the employer who maintained the Plan" and commenced a civil action against the non-bankrupt members in the United States District Court for the District of Massachusetts pursuant to ERISA § 4003(e). PBGC then filed a complaint in the Bankruptcy Court seeking relief from the automatic stay in bankruptcy in order to proceed against Avon and Tenn-ERO (*Bankrupts*) by joining them in the civil action. The District Court (Tauro, J., presiding) referred the complaint to the bankruptcy judge (Lavien, J.) to serve as a master in the civil action.

The Bankruptcy judge concluded that Avon alone had liability under ERISA § 4062 and, since it had no positive net worth, there was no liability. After a hearing, the District Court (Tauro, J.) concluded that all of the petitioners, as members of a controlled group of corporations within § 1563(a) of the Int. Rev. Code of 1954, were jointly and severally liable to PBGC under ERISA § 4062 for the underfunding of the Avon Plan, subject to the 30% net worth limitation of ERISA; that the time for granting a waiver had expired and no consideration could be given to such issue by the Court; granted PBGC's motion for partial summary judgment against

petitioners herein; and, remanded the case to the Bankruptcy judge for a determination of the net worth of the controlled group.

Finding conditions existed which permitted an immediate appeal, the Court of Appeals for the First Circuit granted petitioners' request for permission to appeal from the District Court's interlocutory order and thereafter affirmed the judgment of the District Court.

Reasons for Allowing the Writ.

I. The Decision Below Conflicts with Applicable Decisions of this Court Holding that Retroactive Imposition of Liability Combined with Appropriation of Property of One Employer for Payment of Retirement Benefits to Employees of Another is Unconstitutional.

The Court of Appeals for the First Circuit adopted the construction urged by PBGC in the lower courts that ERISA imposed joint and several liability on all members of a controlled group of corporations for the underfunding of the Avon Plan in an amount in excess of $552,000 despite:

(a) the provisions of the Avon Plan which limited liability for benefits to the assets in the Trust;

(b) the fact that Avon made all required payments to its employees under its collective bargaining agreement including the Avon Plan;

(c) neither Avon nor Tenn-ERO, the Bankrupts, individually or combined, had positive net worth on the termination date;

(d) no member of the controlled group, other than Avon, had signed or adopted the Avon Plan; and

(e) the employees of Avon alone were members of and beneficiaries under the Avon Plan.

This holding is in direct conflict with this Court's decision in *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935).

Prior to the enactment of ERISA, Avon had no liability for the Avon Plan's asset deficiency in the event of its termination. Avon had complied with the pre-ERISA requirements for qualification of its pension plan under § 401 of the Int. Rev. Code of 1954. Its only responsibility was to make annual contributions, actuarially determined, during the term of the collective bargaining agreement to which it was a party. Clearly, its parent corporation, Ouimet, had no liability or responsibility for Avon's undertakings and liabilities under Avon's collective bargaining agreement (*United Paperworkers International Union* v. *T. P. Property Corp.*, 583 F.2d 33 (1st Cir. 1978);[2] *a fortiorari*, the other members of the controlled group had no liability for Avon's obligations under its collective bargaining agreement.

Any liability of Avon to its employees and PBGC prior to September 2, 1974 was, like PBGC itself, non-existent. It arose if at all by the passage of ERISA. It should be noted that during the period from September 2, 1974 through March 25, 1975, the date the Avon Plan was terminated, the asset "deficiency" actually declined from $606,000 to $550,000 so that if

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[2] Wherein the Court of Appeals for the First Circuit rejected the union's attempt to impose liability on the parent corporation to arbitrate and assume a subsidiary's obligations under its collective bargaining agreement, including pension fund payments, since to do so would require the Court to disregard the well-established legal precedent of recognizing separate corporate entities "in favor of a novel rule of imputed liability." 583 F.2d at 36. *Accord*, *N.L.R.B.* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

the liability under § 4062 was limited to a deficiency created *after* the passage of ERISA, no liability would exist.

The District Court, in holding that Avon was, together with all members of the controlled group of corporations, jointly and severally liable for the deficiency in assets on the termination of the Avon Plan, concluded that ERISA as so interpreted, although admittedly retroactive, did not violate due process, since it "would not substantially impair the provisions of the Avon plan" (*Pension Benefit Guaranty Corp.* v. *Ouimet Corp.*, 470 F.Supp. 945, 956 [1979]) and that such liability would "upset settled contractual expectations only to a minimal degree." 470 F.Supp. at 958.

In *Alton Railroad, supra,* this Court struck down the Railroad Retirement Act because it imposed liability on the nation's railroads to pay retirement benefits based not only on future services, but also based on employment prior to enactment of the Act. By so doing, the Act was, in essence, retroactively altering the compensation contracts between the railroads and their employees. In rejecting the government's argument that funding pension benefits based in part on past services was in the best interests of the nation and the railroad industry by promoting efficiency and safety in the future operations of the railroad, the Supreme Court held that such payment would deprive the employers of their property without due process.

> Plainly this requirement [of the Act], alters contractual rights; plainly it imposes for the future a burden never contemplated by either party when the earlier relation existed or when it was terminated. The statute would take from the railroads' future earnings amounts to be paid for services fully compensated when rendered in accordance with contract, with no thought on the part of either employer or employee that further sums must be

> provided by the carrier. The provision is not only retroactive in that it resurrects for new burdens transactions long since past and closed; but as to some of the railroad companies it constitutes a naked appropriation of private property upon the basis of transactions with which the owners of the property were never connected. Thus the Act denies due process of law by taking the property of one and bestowing it upon another. This onerous financial burden cannot be justified upon the plea that it is in the interest of economy, or will promote efficiency or safety. 295 U.S. at 349-350.

Notwithstanding the teachings of *Alton Railroad, supra*, the First Circuit concluded, based on its reading of the legislative history of ERISA and in reliance upon this Court's decision in *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, ____ U.S. ____, 100 S.Ct. 1723 (1980),[3] that "despite the retroactivity inherent in the Act, there is no constitutional due process violation." Ultimately, the First Circuit based its conclusion of "no constitutional due process violation" upon *Usery* v. *Turner Alkon Mining Co.*, 428 U.S. 1 (1976).

Reliance upon *Turner Alkon* is improper since the retroactivity of benefits for black lung victims imposed in that case was essentially compensation for a tort injury, and the payment fell upon the employers who created "the dangerous conditions under which the former employee labored" (428 U.S. at 19) and on the employers "who have profited from the fruits of their labor" (428 U.S. at 18).

However, in the instant case, the claim is in the nature of additional wages, i.e., increased compensation over that re-

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[3] This Court limited its review in *Nachman, supra*, to the question of statutory interpretation of ERISA § 4022(a) and did not consider the constitutional questions. 442 U.S. 940 (1980).

quired by the collective bargaining agreement, in order to meet the former Avon employees' or PBGC's "generalized need for funds" (428 U.S. at 19). The burden of this conclusion will fall upon the creditors of the bankrupts[4] or the other members of the controlled group having no direct relationship with the Avon employees rather than on the former employer, as was the situation in *Turner Alkon*.[5] Thus, this case should be considered and determined by the rationale and holding in *Alton Railroad* rather than *Turner Alkon*.

Moreover, the decision of the Court of Appeals for the First Circuit conflicts with the rationale and holding of this Court in *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), wherein this Court held that a Minnesota statute which imposed liability on employers who terminated pension plans for the payment of an unfunded benefit to all employees who worked at least ten years, including periods of employment prior to the effective date of the Act, was unconstitutional as it violated the Contract Clause of the Constitution. In so holding, this Court said that the effect of the Minnesota statute on the company's contractual obligations was "severe" in that it essentially telescoped a normal funding period during which the company could set aside funds necessary to meet its obligations thereunder to one day. Such is the result of the First Circuit's holding that Avon (and other members of its controlled group of corporations) became instantly and immediately liable for the full underfunding of the Avon plan when it was terminated. There was no liability on September 1, 1974. On September 2, 1974, a liability arose which had

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[4] "[I]t is probable that PBGC will receive all of the bankrupt's assets with the creditors receiving nothing." ____ F.2d ____ (App. 3a).

[5] Ouimet and Ouimet Stay filed proofs of claim in the bankruptcy proceedings for any amounts they may be required to pay PBGC. The Trustee in Bankruptcy filed a cross-claim seeking reimbursement from Ouimet and Ouimet Stay for any amounts the estate may be required to pay PBGC.

the priority of a tax lien. ERISA § 4068(c). Such liability unilaterally amended all collective bargaining agreements containing a defined benefit plan with employees as well as all security agreements with creditors. In addition, it rendered existing financial statements and credit reports invalid and obsolete. In striking down the Minnesota statute, this Court stated that

> [The Minnesota statute] . . . here nullifies express terms of the company's contractual obligation and imposes a completely unexpected liability in potentially disabling amounts. 438 U.S. at 247.

Although Avon made the requisite contributions to the Avon Plan required under the bargaining agreement throughout its existence, its premature termination on March 25, 1975 due to dire financial circumstances deprived it of the time necessary to fund the benefits which had accrued.[6] The Master found the cause of the underfunding to be three-fold: (1) the Plan gave credit for service prior to 1959; (2) the collective bargaining agreement provided for automatic increases in benefits; and (3) the value of the Plan's assets reduced in value due to market conditions.

Under the holding of the First Circuit, ERISA imposes immediate liability for such deficiency contrary to the terms of the Plan. Where no liability existed under its agreement on September 1, 1974, suddenly and unexpectedly, on September 2, 1974, a substantial liability arose, with no time to prepare for, avoid or protect against it. In the words of this Court in *Allied Structural Steel, supra*, such change in its obligations

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[6] ERISA § 302 and § 1013 imposed for the first time an obligation to amortize past service costs, increases in liabilities and experience losses less decreases in pension liabilities and experience gains over periods ranging from 15 to 40 years.

was "severe" and in the words of the First Circuit in *Fornaris* v. *Ridge Tool Co.*, 423 F.2d 563, 568 (1st Cir. 1970), rev'd on other grounds, 400 U.S. 41 (1970); such was a change of "great magnitude" as to violate the due process provisions of the Constitution, considering only Avon's rights and responsibilities.

More serious constitutional constraints are violated in applying this instant liability to the members of the controlled group, other than Avon and Tenn-ERO, since such liability rests *solely* upon their indirect relationship to Avon (through common but not identical stock ownership) and not upon any signature, action in adopting the Plan, or conduct of a proscribed nature requiring the court to disregard the separate corporate entities so as to impose common liability. As to the other members of the controlled group, the imposition of this novel liability under ERISA § 4062 is predicated solely on their relationship to Avon.

> [Such] constitutes a naked appropriation of private property upon the basis of transactions with which the owners of the property were never connected. Thus the Act denies due process of law by taking the property of one and bestowing it upon another. This onerous financial burden cannot be justified upon the plea that it is in the interest of economy, or will promote efficiency or safety. *Railroad Retirement Board* v. *Alton Railroad Co.*, *supra* at 350.

Finally, the decision of the Court of Appeals for the First Circuit disregards the distinction drawn by this Court in *Allied Structural Steel*, *supra*, between the Minnesota Act which "became fully effective the day after its passage" (438 U.S. at 249, n.23) and ERISA which provided "gradual applicability or grace periods" (438 U.S. at 246) thereby soften-

ing its impact and preserving its constitutionality. Assuming *arguendo* that Congress intended and did impose joint and several liability on members of a controlled group of corporations for ERISA § 4062 liability, time should be given to affected employers to adjust to this "novel" concept. Time is made available through the requirement of ERISA § 4001(b) that it be applied "consistent and coextensive" with section 414(c) of the Int. Rev. Code of 1954. The latter section was expressly made applicable to "plan years beginning after December 31, 1975." ERISA § 1017.

II. The Decision Below is Erroneous and Creates a Conflict of Rationale Among the Circuits.

Although the liability section of ERISA, § 4062, 29 U.S.C. § 1362 applies to "any employer who maintained a plan (other than a multi-employer plan) at the time it was terminated" and the facts show that only Avon signed the plan agreement; contributed to the plan trust; and, only its employees participated, the First Circuit held that each member of the Ouimet Group comprising the controlled group of corporations within the meaning of § 1563(a) of the Int. Rev. Code of 1954, was jointly and severally liable for the deficiency under § 4062, 29 U.S.C. § 1362. The First Circuit based such liability on its reading of § 4001(b), 29 U.S.C. 1301(b) which states, in part, that: "all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer."

Neither the language of the statute nor its legislative history supports this reading of § 4001(b) by the First Circuit which omits the words "all employees" and converts § 4001(b) into a

definitional statement of the term "single employer." Such rewriting of the section is erroneous because it:

(a) Adds a new "definition" to § 4001;

(b) Alters § 4001(b) by eliminating the subject of the sentence, namely "employees," and substitutes for it either "corporations under common control" or "trades or businesses under common control;"

(c) Requires an administrative amendment to the Internal Revenue Code of 1954 which was effected, as found by the District Court, by the exchange of letters between the Treasury and PBGC, so as to permit a deduction under § 404(g) of the Int. Rev. Code of 1954 for the payment by a company other than the actual employer which deduction was not allowable prior to ERISA;[7]

(d) Ignores the word "single" in § 4001(b);

(e) Imposes joint and several liability on each member of the controlled group for the § 4062 liability without any basis or justification in the statutory language or legislative history;

(f) Makes § 4062(d) surplusage since it is not necessary to impose § 4062(a) liability on a parent corporation on liquidation if it is already liable as a member of the controlled group of corporations;

(g) Imposes joint and several liability on Avon and Tenn-ERO, the bankrupts, having no positive net worth contrary to the express wording of the § 4062 limiting liability to "30 percent of the net worth of the employer;" and

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[7] Section 404(g) of the Int. Rev. Code of 1954 was amended by § 205 of the Multiemployer Pension Plan Amendments Act of 1980 to allow a deduction, effective from the enactment of the Act, for employer liability payments under ERISA § 4062 to a taxpayer whose liability for the payments arises solely out of membership in a controlled group of companies.

(h) Overrules well established and important judicial precedent and rationale recognizing the limited liability of separate entities by this and other federal courts.[8]

III. The Case Presents Critical Issues of Federal Law Which Should be Settled by this Court.

A. *Liability.*

Five judges in this case have considered and construed the interrelationship of § 4001(b) with § 4062(a) of ERISA and have arrived at three different meanings for the words used in the statute. This issue is critical to:

(a) the many employers who are members of a controlled group and their employees;

(b) any corporation considering acquiring another which may have an underfunded pension plan;

(c) a company experiencing financial difficulties and having an underfunded plan who is seeking to be acquired by a stronger corporation so as to enable it to stay in business and continue to pay wages and make contributions under its plan;[9] and

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[8] *Railroad Retirement Board* v. *Alton Railroad Co., supra*; *N.L.R.B.* v. *Burns International Security Services, Inc., supra*; *Howard Johnson Co., Inc.* v. *Detroit Local Joint Executive Board, Hotel & Restaurant Employees*, 417 U.S. 249 (1974); *York Chrysler - Plymouth, Inc.* v. *Chrysler Credit Corporation*, 447 F.2d 786 (5th Cir. 1971); *Bendix Home Systems, Inc.* v. *Hurston Enterprises, Inc.*, 566 F.2d 1039 (5th Cir. 1978), rehearing denied February 28, 1978; *Gulfco Investment Corporation* v. *Hogan*, 593 F.2d 921 (10th Cir. 1979), rehearing denied April 10, 1979; *United Paperworkers International Union* v. *T. P. Property Corp., supra.*

[9] *See N.L.R.B.* v. *Burns International Security Services, Inc., supra*, wherein this Court stated: "A potential employer may be willing to take

(d) PBGC itself which is obligated to fund the insured benefits of the Avon plan as well as other similarly situated plans.

The differing approaches and interpretations of the judges on this critical issue and its importance not only to employees and employers under ERISA but as it impacts on other areas of the law require review and restatement by this Court.

If Congress intended to impose joint and several liability on all members of a controlled group of corporations *solely* based on their relationship, one would expect very clear statutory language to that effect supported by extensive legislative findings and history. In this case, § 4062 says not one word as to how the liability is to be apportioned where there are multiple entities and a single employer plan.[10] Contrast this with ERISA § 4064 which allocates liability among employers under a multi-employer plan based on contributions and applies the 30% limitation of liability under § 4062(b)(2) to each employer separately. Since imposition of liability on employers who had not signed or adopted the plan would at least be "novel," one should not have to seek out this liability and find it only upon an extensive rewrite of the statute. If Congress had intended the result found by the First Circuit, it was one of the best kept Congressional secrets of all times.

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over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital." 406 U.S. at 287-288.

[10]The District Court (Tauro, J.) suggested that the failure of Congress to apportion liability among members of the controlled group could be attributable to "legislative oversight or to a determination that such apportionment is better left as a business decision." 470 F.Supp. at 953-954, n.20. Fairness requires that, at least, the creditors and minority shareholders of all affected members should have a vote in any such decision.

B. *Bankruptcy.*

Avon, which created and maintained the Avon Plan and whose employees were the only ones covered by and benefited from the plan, and Tenn-ERO, its wholly owned subsidiary, which the parties and the Courts have combined herein, were adjudicated bankrupt on March 22, 1976. On the critical valuation date for § 4062 liability, neither had any positive net worth. Under § 4062, neither should have any liability. However, PBGC, by adding Ouimet, Ouimet Stay, Welting and Wareham Trust, as members of a controlled group, alleges that such combination creates an "employer" entity which has a positive net worth and thereby creates a liability, where none otherwise existed. However, the use of the term "net worth" in § 4062 to define the limit of an employer's liability underscores the unmistakable intent of Congress to expose to PBGC only the funds of an employer as are not subject to claims of general creditors. The concept of "net worth" by its very nature shields from PBGC sufficient assets of the employer to cover outstanding liabilities, i.e., it prevents harm to the creditors. The claim asserted against Avon and Tenn-ERO by PBGC's lien and claim and sustained by the lower courts attains the very result which Congress through § 4062(b) sought to avoid, viz., PBGC has a priority lien on all of the remaining assets of the bankrupts, despite the lack of any net worth. Not only does the First Circuit's decision have an adverse impact on all creditors' rights and their expectations in bankruptcy, it has a chilling effect on all financial statements issued from and after September 2, 1974.

C. *Financial Statements.*

The decision of the Court of Appeals for the First Circuit that all members of a controlled group of corporations have

joint and several liability for an underfunded pension plan which is terminated has far reaching effects on financial statements, the financial community and on the credit worthiness of every business organization. At the least, it requires that each member of a controlled group note as a contingent liability the amount of any underfunding of any member's plan each year; if such a plan is thereafter terminated, *each* corporation must bring on its books and reflect as an actual liability the amount of the deficiency under ERISA, regardless of the net worth and ability to pay of the employer contracting for and maintaining the plan; the liability may exceed 30% of an individual member's net worth when the net worth of other members is added; and the liability may greatly exceed its obligations under its own plan (of which a creditor would be advised) since it must reflect liability under all other defined benefit plans of every other member of a controlled group, regardless of its ability to participate in the decision of adopting such a plan; each employer (and their creditors and shareholders) must await the decision and action by PBGC as to which member it will proceed against to collect the § 4062 liability; and thereafter the paying entity must seek reimbursement from or contribution by the other members having some or all or no responsibility for the Plan. How does an unsecured creditor protect himself against the priority of the PBGC lien where the debtor is a known or unknown member of a controlled group of corporations? What assurances can a member of the controlled group seeking credit give that its declared assets less disclosed liabilities are and will remain available to an unsecured creditor if the maintenance or termination of an underfunded plan by another member (known or unknown, existing or not yet a member) can wipe out or substantially reduce the net worth of the proposed debtor?

The legislative silence on this critical aspect of the issue is strong, if not conclusive, evidence that Congress never envis-

ioned or intended to impose liability on multiple entities for single employer plans.

D. *Waiver of Liability.*

By ERISA § 4004(f)(4), PBGC was given the power "for only the first 270 days after the date of enactment of the Act" to waive or reduce the liability imposed by § 4062 "on any employer with respect to a plan terminating during that 270 day period if the corporation determines that such waiver or reduction is necessary to avoid unreasonable hardship in any case in which the employer was not able, as a practical matter, to continue the plan."

Because of horrendous losses, the Avon Plan was terminated on March 25, 1975, within the 270 day period. However, since neither Avon nor any member of the controlled group submitted a written request for a waiver, PBGC declined to consider or grant a waiver. The District Court and Court of Appeals for the First Circuit both held that a written request was not necessary to qualify for a waiver under § 4004(f)(4). However, the courts below held that the expiration of the 270 day period terminated PBGC's authority to act and petitioners' right to a waiver was thereby lost.

The District Court in *A-T-O, Inc.* v. *Pension Benefit Guaranty Corporation*, 456 F. Supp. 545 (N.D. Ohio 1978) appeal docketed, No. 78-3269, 6th Cir., May 24, 1980, held that PBGC violated 5 U.S.C. § 706(2)(A) as being "arbitrary, capricious, [and] an abuse of discretion" where it failed to apply the statutory standards of unreasonable hardship and impracticability of continuation in denying the plaintiff's request for a waiver. Since "inaction is tantamount to an order denying" relief because it results in a final disposition of petitioner's rights, *(Environmental Defense Fund, Inc.* v. *Hardin*, 428

F.2d 1093 [D.C. Cir. 1970]), the reviewing court is directed to "compel agency action unlawfully withheld or unreasonably delayed," and to set aside agency action found to be "arbitrary, capricious [and] an abuse of discretion." 5 U.S.C. § 706(1) and (2). The decision below fails to heed this clear mandate.

The holdings by the First Circuit and District Court below on this issue render the statutory provisions allowing a waiver meaningless and makes the action, or inaction, by PBGC non-reviewable. Such clearly must fail for lack of due process and as violative of 5 U.S.C. § 706. Where PBGC would not act on the grounds that a waiver was not requested by petitioners herein (which the First Circuit and District Court both found was not required by ERISA) and where the facts relevant to the statutory standards are in the record, the courts should and must act in determining whether a waiver under § 4004(f)(4) should be granted. *Accord, A-T-O, Inc.* v. *Pension Benefit Guaranty Corporation, supra.* It is difficult to conceive of a case in which waiver would be more appropriate than in this case.

E. *Petitioners' Construction of Statute.*

Petitioners contend that the phrase in § 4001(b): "all *employees* of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer" (emphasis added) has the same meaning as similar language of § 414(b) and (c) of the Int. Rev. Code of 1954. The Congressional reports clearly show that the "treatment of employees of trades or businesses under common control," as used in § 414(b) and (c) of the Int. Rev. Code of 1954 did not require all members of a controlled group to adopt the same plan or indeed to even have a plan. Instead, § 414(b) and (c) were designed as a special rule to

prevent the use of the controlled group to circumvent the anti-discriminatory provisions dealing with the qualification and operation of the Plan. The same words should have the same meaning in determining the amount of employees' insured benefits under a terminated plan and the employers liable therefor. Viewed in the same light, § 4001(b) is meant to be a special rule and not a definition to prevent the controlled group from reducing or adversely affecting the amount of insured benefits payable to employees of a terminated plan merely by moving employees among members of the controlled group so that liability, if any, would rest on having participated in the proscribed misconduct or having received the benefit of the employee's services whose benefits are being reduced or eliminated, where such employer had not signed or otherwise adopted the plan.

Under this construction, the employer who sets up and maintains a plan by adopting and contributing to it is primarily liable for any underfunding on its termination under ERISA § 4062. Where, however, (1) such employer does not have the necessary funds to pay the underfunding or such is not collectible due to the limitations of § 4062 when applied to such employer, and (2) a portion or all of the underfunding arises from costs attributable to treating some employees of the controlled group "as employed by a single employer," then upon the happening of both conditions, the other members of the controlled group who are involved by their action are liable for all or such portion of the underfunding in proportion to the benefit, if any, they have gained. As so construed, the responsibility and payment are tied to and coextensive with such benefit.

To adopt petitioners' construction of the statute would give the words used in the statute their ordinary meaning and make them consistent with the other provisions of the statute. It would leave ERISA intact and fully effective to prevent any

abuse on termination, as it has to prevent abuse on qualification and operation. It eliminates any constitutional questions. Such construction is favored. *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971).

Conclusion.

For the foregoing reasons, petitioners pray that this Court allow a writ of certiorari to issue to the United States Court of Appeals for the First Circuit for purposes of reviewing and reversing the decision of that Court.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 79-1414

PENSION BENEFIT GUARANTY CORPORATION,

PLAINTIFF-APPELLEE,

and

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, SOLOMON REDDIX AND ALEX WILLIAMS,

PLAINTIFFS-INTERVENORS-APPELLEES,

v.

OUIMET CORPORATION, OUIMET STAY & LEATHER COMPANY, OUIMET WELTING COMPANY, EMIL R. OUIMET WAREHAM TRUST, AVON SOLE COMPANY, TENN-ERO CORPORATION AND HERBERT KAHN, TRUSTEE,

DEFENDANTS-APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. JOSEPH L. TAURO, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Richard G. Maloney and *Sidney Werlin*, with whom *Maloney, Williams & Baer*, *Richard M. Zinner*, *Friedman & Atherton*, *Paul P. Daley*, *Hale & Dorr*, *Richard E. Mikels*, and *Riemer & Braunstein* were on brief, for appellants.

Judith F. Mazo, with whom *Henry Rose*, *James R. Dulcan*, and *Burns, Jackson, Miller, Summit & Washington* were on brief, for Pension Benefit Guaranty Corporation, appellee.

Bertram Diamond for United Rubber, Cork, Linoleum and Plastic Workers of America, Soloman Reddix and Alex Williams, appellees.

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August 29, 1980

BOWNES, *Circuit Judge.* Jurisdiction in this interlocutory appeal from the United States District Court for the District of Massachusetts is predicated upon 28 U.S.C. § 1292(b).[1] The issue is one of first impression involving the interpretation of the Employee Retirement Income Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 832, 29 U.S.C. §§ 1001-1381.

The case[2] began with the bankruptcy of a corporation, Avon, and its wholly owned subsidiary, Tenn-ERO, which were part of a larger group of corporations, the Ouimet Group.[3] A brief prefatory explanation of ERISA, and the role in it of the Pension Benefits Guaranty Corporation (PBGC), is necessary to appreciate the issues. Under ERISA, PBGC assumes the administration and payment of benefits of a terminated pension plan whose assets are insufficient to cover all guaranteed benefits. PBGC may recover from the employer 30% of its net worth determined as of a date within one hundred twenty days of the plan termination, or the deficit, whichever is less. The bankrupts, here, had no positive net worth as of the valuation date. This means that, if the term "employer" is limited to the bankrupts, PBGC recovers

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[1] In pertinent part, 28 U.S.C. § 1292(b) provides:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . . .

[2] The opinion of the district court is reported at 470 F. Supp. 945.

[3] The Ouimet Group challenges certain retroactively-applied provisions of ERISA. After oral argument in the instant case, the Supreme Court heard oral arguments in *Nachman Corporation* v. *PBGC*, 48 U.S.L.W. 4524 (May 12, 1980), which also involved a retroactivity challenge to the Act. Accordingly, we postponed our decision until the Supreme Court had decided *Nachman*.

nothing and a dividend will be paid to the creditors. If, on the other hand, "employer" is construed to mean the Ouimet Group of corporations, including the bankrupts, it is probable that PBGC will receive all of the bankrupts' assets with the creditors receiving nothing.

The Ouimet Group of Corporations

Over forty years ago, Emil R. Ouimet purchased the Brockton, Massachusetts, shoe-trim manufacturing concern for which he had worked for several years. In 1940, he changed its name to Ouimet Leather Company. He renamed it Ouimet Stay & Leather Company (Stay) when production expanded to include shoe upper strippings as well as other types of shoe findings.[4] In 1950, he founded Ouimet Corporation (Ouimet), a Delaware corporation with its principal place of business in Nashville, Tennessee. Ouimet manufactures shoe findings, laminations, and vinyl-coated fabrics. Emil also founded Brockton Plastics (Brockton), a Massachusetts corporation producing, among other things, shoe welting, and Ouimet Welting (Welting), a now-dormant corporation. In 1968, Ouimet purchased the Avon Sole Company (Avon), a shoe sole manufacturing factory located in Holbrook, Massachusetts. In 1972, Avon formed a wholly-owned subsidiary, Tenn-ERO, to operate a nonunion plant in Lawrenceburg, Tennessee.

In 1971, Emil Ouimet created the Wareham Trust (Trust) as a tax device. Its assets include the combined Stay-Brockton factory and the houses in which Emil and his son Richard reside.

Emil Ouimet owns 100% of Trust; 80% of Ouimet; and 80% of Stay He owned all stock in Avon which, in turn, held 100% of Tenn-ERO's stock. Stay has a 100% interest in Ouimet Welting; and a 50% interest in Brockton. At all times

[4] A finding is a trim, decorative item, or small stripping stitched onto the upper portion of a shoe. The terms finding and stay are interchangeable.

pertinent to this litigation, Emil Ouimet was president of all Ouimet Group corporations except Ouimet and Stay, of which Richard was president.

The Plan

Pursuant to a collective bargaining agreement with the Rubber Workers Union and the International Brotherhood of Firemen and Oilers, Avon instituted a pension plan for its hourly workers in 1959. The plan provided for full vesting[5] after ten years of service, if certain age criteria were satisfied. It gave the company the right to "amend, modify, suspend or terminate the Plan" and limited the benefits payable upon termination of the plan to "the assets then remaining in the Trust Fund." Avon made all actuarily mandated contributions, but at all times the plan was underfunded. There were three reasons for this. (1) Initial underfunding occurred because credit was given for past years of service while no immediate contribution to the plan for this credit was required. Rather, the deficit was expected to be amortized over thirty years. (2) Ouimet negotiated several benefit increases which were not met by current contributions. (3) A decrease in the value of certain fund investments in 1974 and 1975 led to a devaluation of the plan assets. When Ouimet purchased Avon, the underfunding amounted to $92,000. By March 25, 1975, the day Avon closed its doors, it was $552,339.64.

Prior Proceedings

On June 18, 1975, Avon and Tenn-ERO filed Chapter XI bankruptcy petitions; on March 22, 1976, they were adjudicated bankrupts. When the plant shut-down appeared imminent, Avon notified PBGC of its intent to terminate the pension plan.[6] PBGC responded to Avon's request to terminate the plan with a letter stating:

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[5] Vesting is defined as the "nonforfeitable right of interest which an employee acquires in the pension fund." Employee Retirement Income Security Act of 1974, H.R. REP. No. 93-533, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4639, 4643.

[6] 29 U.S.C. § 1341(a) requires plan administrators to notify PBGC of proposed terminations at least ten days prior to the proposed termination date.

> It has been determined that Avon Sole Company was the employer who maintained the Plan at the date of termination for purposes of Section 4062 of the Act, 29 U.S.C. § 1362.

It estimated Avon's liability to be $717,500 and filed a proof of claim in the Avon/Tenn-ERO bankruptcy proceeding for that amount. After examining the bankrupts' books,[7] PBGC determined that Ouimet, Stay, and Welting should also be considered employers who maintained the plan. It computed the liability of the five corporations at $552,339.64,[8] and filed an amended proof of claim in that amount in the bankruptcy proceedings. Ouimet and Stay filed proofs claiming that, if held liable, they should be subrogated to the rights of PBGC against Avon and Tenn-ERO. The bankruptcy trustee cross-claimed alleging that Ouimet and Stay should reimburse the estate for any payments which Avon and Tenn-ERO would be required to make to PBGC. On March 31, 1976, PBGC filed suit against the Ouimet Group in the United States District Court for the District of Massachusetts.[9] After filing

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[7] PBGC has broad investigatory authority under 29 U.S.C. § 1303(a)-(c).

[8] Maximum liability to PBGC is the lesser of the pension underfunding or 30% of the employer's net worth. 29 U.S.C. § 1362(b). PBGC determined the net worth of the Ouimet Group, excluding Trust and Brockton, to be $1,875,283 on December 31, 1974. Because 30% of net worth ($562,601.70) exceeds the amount of pension underfunding ($552,339.64) the liability equals the pension fund deficit.

[9] 29 U.S.C. § 1303(e) authorizes PBGC to bring suit for legal and/or equitable relief. Jurisdiction is vested in the United States district courts.

After commencement of plan termination, if PBGC finds that the plan is unable to pay basic benefits, 29 U.S.C. § 1341(e) empowers PBGC to apply to the district court for a decree adjudicating that the plan must be terminated according to procedures outlined in 29 U.S.C. § 1342. Pending adjudication, "such court shall stay . . . any pending bankruptcy." 29 U.S.C. § 1342(f).

suit against Ouimet, Stay, Welting, Avon, and Tenn-ERO, PBGC determined that Trust should be treated as an employer as well and it was joined as an additional defendant.

The district court named PBGC trustee of the Avon plan.[10] It appointed the bankruptcy judge sitting on the Avon/Tenn-ERO proceedings to serve as master.[11] Following a twelve-day trial in December, 1976, the bankruptcy judge recommended that no liability attach to the Group and that Avon/Tenn-ERO's negative net worth relieved them of liability to PBGC. After release of the bankruptcy judge's memorandum, Union moved to intervene to protect the interests of former Avon employees and the district court granted the motion. The court held a hearing on March 13, 1979. In its opinion, it ruled that ERISA imposes joint and several liability on all members of a controlled group of corporations. After a careful analysis of the statutory and constitutional issues, it granted PBGC's motions for partial summary judgment and for relief from the automatic stay in bankruptcy and remanded the case to the bankruptcy court for a determination of the net worth of the Ouimet Group of corporations. *Pension Benefit Guaranty Corp.* v. *Ouimet Corp.*, 470 F. Supp. 945, 954, 958 (D. Mass. 1979). We affirm, but on somewhat different grounds.

The Statutory Scheme

The employer-sponsored retirement income program, as one form of worker compensation, came into prominence in

[10] 29 U.S.C. § 1342(b) authorizes the appointment by the district court of PBGC as trustee. The court named PBGC trustee of Avon's plan on April 20, 1976, ordering that the termination be effective as of March 25, 1975. PBGC now pays monthly benefits averaging $87 to 108 employees. An additional 150 workers will receive no pension because their rights were not vested when Avon went out of business.

[11] A district court may appoint a special master "in matters of account and of difficult computation of damages." Fed. R. Civ. P. 53. The proceedings were consolidated because the issues in both cases were "substantially identical." *PBGC* v. *Tenn-ERO Corp.*, No. 76-1314 (D. Mass. May 13, 1977).

the 1940's. Expansion of coverage and a parallel increase in plan assets were marked in the ensuing decades. The field was unregulated by the federal government until the enactment, in 1958, of the Welfare and Pension Plans Disclosure Act. 29 U.S.C. § 301 *et seq.* Its purpose was to curb abuses by those to whom plan administration was entrusted. In 1962, criminalization of certain acts of malfeasance gave the earlier legislation some clout. Employee Retirement Income Act of 1974, H.R. REP. No. 93-533, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4639, 4640-41. Plans administered jointly by employers and unions were under the dominion of the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.* The tax advantages accruing to employers prompted Congress to enact Revenue Code provisions controlling plan contributions. 26 U.S.C. §§ 401-404. Only a plan maintained "for the exclusive benefit of [the] employees or their beneficiaries" was deemed qualified. 26 U.S.C. § 401(a)(4). Of primary significance were antidiscrimination rules denying deductions if a plan was designed to benefit officers, shareholders, or highly compensated employees. *Id.*

By 1974, pension plans had burgeoned to include over thirty million workers; $150 billion in assets were held in trust for pensions, H.R. REP. No. 93-533, *supra*, [1974] U.S. CODE CONG. & AD. NEWS at 4641; and twenty thousand workers were annually affected by pension plan failures. Employee Retirement Income Security Act of 1974, S. REP. No. 93-383, 93 Cong. 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS, 4890, 5036. In many instances, benefits were subject to forfeiture "even when separated employees [were] within a few months, or even days, of qualifying for retirement." H.R. REP. No. 93-533, *supra*, [1974] U.S. CODE CONG. & AD. NEWS at 4643. The cloud of forfeitability was attributable to lack of uniformity in vesting, the Internal Revenue provisions requiring funding of current, but not past-service liabilities, and

plan agreements which generally limited employee benefits to the corpus of the pension fund if a plan terminated prematurely.

Congress confronted these problems by enacting ERISA, a comprehensive statutory scheme detailing "minimum standards . . . assuring the equitable character of [pension] plans and their financial soundness." 29 U.S.C. § 1001(a).[12] 29 U.S.C. §§ 1301-81 created the Pension Benefit Guaranty Corporation and instituted a system of pension plan termination insurance. Designed to guarantee minimum pension benefits to workers whose employers discontinue pension plans, termination insurance is an industry-wide risk — and cost-sharing program. From a pool of premiums contributed by employers who maintain plans, PBGC pays vested benefits to affected employees when a plan terminates. In addition to participation in the insurance program, which is mandatory in most instances, "any employer who maintained a plan (other than a multiemployer plan) at the time it was terminated," 29 U.S.C. § 1362(a), is liable to PBGC for the lesser of

> (1) the excess of —
>
> (A) the current value of the plan's benefits guaranteed under this subchapter on the date of termination over
>
> (B) the current value of the plan's assets allocable to such benefits on the date of termination, or
>
> (2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

29 U.S.C. § 1362(b).

[12] 29 U.S.C. §§ 1001-1144 set out requirements of minimum participation, vesting, and funding. 26 U.S.C. §§ 401-415 contain coordinate tax provisions. 29 U.S.C. §§ 1201-42 detail the procedure for the agencies to whom enforcement is relegated.

Who Is The Employer?

We start with the definition section of subchapter III — Plan Termination Insurance. 29 U.S.C. § 1301(b) provides in part:

> For purposes of this subchapter, under regulations prescribed by the corporation, *all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer.* The regulations prescribed under the preceding sentence shall be consistent and co-extensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26[13] (emphasis added).

Section 1301(b) applies, by its terms, only to groups "under common control" as that term is defined in regulations coextensive with the regulations under 26 U.S.C. § 414(c).[14]

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[13] 26 U.S.C. § 414(c) states in pertinent part, "all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer."

[14] Temporary Treasury Regulations promulgated under 26 U.S.C. § 414(c) provides in part:

> §11.414(c)-2 Two or more trades or businesses under common control [TD 7388, filed 10-31-75].
>
> (a) In general. For purposes of this section, the term "two or more trades or businesses under common control" means any group of trades or businesses which is either a "parent-subsidiary group of trades or businesses under common control" as defined in paragraph (b) of this section, a "brother-sister group of trades or businesses under common control" as defined in paragraph (c) of this section, or a "combined group of trades or businesses under common control" as defined in paragraph (d) of this section. For purposes of this section and §§ 11.414 (c)-3 and 11.414(c)-4, the term "organization" means a sole proprietorship, a partnership (as defined in section 7701(a)(2)), a trust, an estate, or a corporation.
>
> (b) Parent-subsidiary group of trades or businesses under common control — (1) General. The term "parent-subsidiary group of trades or businesses under common control"

Those regulations define a group "under common control" as a parent-subsidiary group, brother-sister group, or combined group. The regulations go on to define these terms

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means one or more chains of organizations conducting trades or businesses connected through ownership of a controlling interest with a common parent organization if—

(i) A controlling interest in each of the organizations, except the common parent organization, is owned (directly and with the application of § 11.414(c)-4 (b) (1), relating to options) by one or more of the other organizations; and

(ii) The common parent organization owns (directly and with the application of § 11.414(c)-4(b)(1), relating to options) a controlling interest in at least one of the other organizations, excluding, in computing such controlling interest, any direct ownership interest by such other organizations.

(2) Controlling interest defined—(i) Controlling interest. For purposes of paragraphs (b) and (c) of this section, the phrase "controlling interest" means:

(A) In the case of an organization which is a corporation, ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote of such corporation or at least 80 percent of the total value of shares of all classes of stock of such corporation:

(B) In the case of an organization which is a trust or estate, ownership of an actuarial interest of at least 80 percent of such trust or estate:

(C) In the case of an organization which is a partnership, ownership of at least 80 percent of the profits interest or capital interest of such partnership; and

(D) In the case of an organization which is a sole proprietorship, ownership of such sole proprietorship.

(ii) Actuarial interest. For purposes of this section, the actuarial interest of each beneficiary of a trust or estate shall be determined by assuming the maximum exercise of discretion by the fiduciary in favor of such beneficiary. The factors and method prescribed in § 20.2031-10 of this chapter (Estate Tax Regulations) for use in ascertaining the value of an interest in property for estate tax purposes shall be used for purposes of this subdivision in determining a beneficiary's actuarial interest.

(c) Brother-sister group of trades or businesses under common control — (1) General. The term "brother-sister group of trades or businesses under common control" means two or

according to the degree and nature of common stock ownership. The Ouimet Group, with the exception of Brockton, which was excluded by stipulation, clearly meets the test of stock ownership in the regulations. The group is, therefore, under common control for purposes of section 1301(b).

The apparent meaning of section 1301(b) is that a group under common control is to be treated as a single employer for

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more organizations conducting trades or businesses if (i) the same five or fewer persons who are individuals, estates, or trusts own (directly and with the application of § 11.414(c)-4), singly or in combination, a controlling interest of each organization, and (ii) taking into account the ownership of each such person only to the extent such ownership is identical with respect to each such organization, such persons are in effective control of each organization.

(2) Effective control defined. For purposes of this paragraph, persons are in "effective control" of an organization if —

(i) In the case of an organization which is a corporation, such persons own stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote of such corporation or more than 50 percent of the total value of shares of all classes of stock of such corporation:

(ii) In the case of an organization which is a trust or estate, such persons own an aggregate actuarial interest of more than 50 percent of such trust or estate:

(iii) In the case of an organization which is a partnership, such persons own an aggregate of more than 50 percent of the profits interest or capital interest of such partnership; and

(iv) In the case of an organization which is a sole proprietorship, such persons own such sole proprietorship.

(d) Combined group of trades or businesses under common control. The term "combined group-of-trades or businesses under common control" means any group of three or more organizations, if (1) each such organization is a member of either a parent-subsidiary group of trades or businesses under common control or a brother-sister group of trades or businesses under common control, and (2) at least one such organization is the common parent organization of a parent-subsidiary group of trades or businesses under common control and is also a member of a brother-sister group of trades or businesses under common control.

purposes of subchapter III, which is entitled Plan Termination Insurance. It appears, then, that the term "employer," as used in section 1362(b), which is part of subchapter III, refers, in the case of a group under common control, to all the "trades or businesses" which are members of the group. Under this reading of the statute, all members of the Ouimet Group would be jointly and severally liable to PBGC.

Ouimet argues, however, that section 1301(b) does not mean what it appears to mean. Rather, in Ouimet's view, this language was intended only to prevent employers from avoiding application of ERISA by shifting employees around among various corporate entities. Ouimet maintains that, in the absence of section 1301(b), an employer could avoid application of ERISA by dividing into several corporations, each with less than twenty-five employees. Alternatively, an employer could shift an individual employee among corporations so as to minimize his length of service in any one corporation to avoid allowing his benefits to become vested.

Ouimet is correct in asserting that Congress intended to prevent such evasion of ERISA. It is clear, however, that this was accomplished through the anti-discrimination rules of Title II and the vesting and participation minimums under Title I. If Congress had intended to limit the application of section 1301(b) to certain purposes, such as computing the number of employees for application of section 1321(b)(13), or the length of an employee's service for application of section 1322(b)(3)(A), it could have done so by referring specifically to the affected sections. Instead, Congress referred to "this subchapter." We must assume that Congress meant, by that phrase, the whole subchapter, including section 1362(b).

Ouimet argues that our reading of section 1301(b) renders section 1362(d)(2) superfluous. On this point, we agree with the district court's observation; since the definition of "parent" in the regulations under 26 U.S.C. § 414(c) is not incorporated into section 1362, there may be situations in which an

employer is liquidated into a parent corporation which does not meet the definition of "parent" that is used to define a group under common control. In such a situation, section 1301(b) would not apply, and section 1362(d)(2) would be necessary to impose liability on the parent.

Ouimet also asserts that our reading of section 1301(b) is incompatible with section 1107(d)(7). Ouimet focuses on the words, "[a] corporation is an affiliate of an employer if it is a member of any controlled group of corporations . . . of which the employer who maintains the plan is a member," 29 U.S.C. § 1107(d)(7), and argues that this means that the employer cannot be the group. Again, we agree with the district court. This argument ignores the fact that section 1301(b) is in Title IV of the Act and applies only to subchapter III of that Title. The asserted incompatible language of section 1107(d)(7) is not in Title IV, let alone subchapter III. Defendants' construction mixes apples and oranges.

We do not think it necessary to track in detail each of Ouimet's other arguments against application of the plain meaning of section 1301(b), since we consider them adequately addressed in the district court's opinion. We hold that the Ouimet Group, as a group under common control, is one employer for purposes of liability under section 1362.

We are not persuaded that, because only one of a group of corporations under common control contributes to a plan, it is unjust to make the group responsible for the plan's deficit. The facts of this case illustrate why such a group should be treated as an integrated whole. Ouimet purchased Avon with full knowledge of the plan and its funding requirements. Ouimet participated in the labor negotiations resulting in greater pension benefits that contributed to the deficit. The Ouimet Group filed a consolidated tax return on which the Avon contributions were deducted. We see nothing unfair in treating the Ouimet Group as a single employer.

We agree with the district court that the group under common control consists of Ouimet, Trust, Stay, Welting, and Avon/Tenn-ERO.

Retroactivity

Defendants challenge the retroactive impact of ERISA for underfunding liability on both statutory and constitutional grounds. The Sixth Circuit confronted the same challenges in *Nachman Corporation* v. *Pension Benefit Guaranty Corporation*, 592 F.2d 947 (7th Cir. 1979). Its decision upholding the retroactivity features of the Act on both grounds was appealed. The Supreme Court granted certiorari, but limited its review to the statutory question. *Nachman Corporation* v. *Pension Benefit Guaranty Corporation*, 48 U.S.L.W. 4524 (May 12, 1980). It stated the statutory question as follows:

> The question in this case is whether former employees of petitioner with vested interests in a plan that terminated the day before much of ERISA became fully effective are covered by the insurance program notwithstanding a provision in the plan limiting their benefits to the assets in the pension fund.

Id. at 4524. It held that, despite the retroactive effect on the Nachman Corporation, the pension benefits were "nonforfeitable" and that PBGC had a statutory right to reimbursement from the employer. Since the pension plan in this case terminated prior to December 31, 1975, and contains language substantially identical to the language in the *Nachman* plan, defendants' statutory retroactive challenge is foreclosed by the Supreme Court decision in *Nachman*. *See* dissent of Mr. Justice Powell. *Id.* at 4534.

The constitutional challenge to the retroactive effects of ERISA on defendants is based on due process grounds. The battle lines are drawn around redoubtable cases. Defendants rely primarily on *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), and *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935). PBGC counters with *Usery* v. *Turner Elkhorn Mining*, 428 U.S. 1 (1976). We agree with the Sixth Circuit that *Turner Elkhorn* carries the day.

The record supporting the enactment of ERISA,

> wholly unlike that present in *Allied Structural Steel*, demonstrates that "the presumption favoring 'legislative judgment as to the necessity and reasonableness of a particular measure' " must be allowed to govern here. 438 U.S. at 247, 98 S. Ct. at 2724. *Turner Elkhorn Mining*, 428 U.S. at 18, 19, 96 S.Ct. 2882; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563 (1955). Title IV of ERISA satisfies Nachman's rights to Due Process.

Nachman Corporation v. *Pension Benefit Guaranty Corporation*, 596 F.2d at 963. We note that the Supreme Court quoted extensively in a footnote the analysis the Seventh Circuit used to distinguish ERISA from the Minnesota statute in *Allied Structural Steel Co.* v. *Spannaus*. *Nachman Corporation* v. *Pension Benefit Guaranty Corporation et al.*, 48 U.S.L.W. at 4526 n.12. We hold that, despite the retroactivity inherent in the Act, there is no constitutional due process violation.

Waiver

To temper the immediate impact of ERISA on employers terminating plans, Congress authorized PBGC to issue full or partial liability waivers in cases of extreme hardship during the first two hundred seventy days after ERISA's enactment. 29 U.S.C. §§ 1304(f)(4).[15] During the two hundred seventy day period, PBGC promulgated no guidelines relative to waiver application procedures, but, on May 30, 1975, the final day of its temporary authority, it waived liability

[15] 29 U.S.C. § 1304(f) in relevant portion provides:

> In addition to its other powers under this subchapter, for only the first 270 days after September 2, 1974, the corporation may—
>
> (4) waive the application of the provisions of sections 1362, 1363, and 1364 of this title to, or reduce the liability imposed under such sections on, any employer with respect to a plan terminating during that 270 day period if the corporation determines that such waiver or reduction is necessary to avoid unreasonable hardship in any case in which the employer was not able, as a practical matter, to continue the plan.

in most cases in which it had received a letter requesting a waiver. These waivers were contingent upon subsequent investigation into qualification for hardship status. The sole procedural requirement of section 1304(f)(4) is that the plan terminate during the applicable period. Fulfilling that requirement triggers eligibility for consideration of relief from liability.

On March 14, 1975, more than two months prior to the expiration of PBGC's temporary authority, Avon notified PBGC of its intent to terminate the plan on March 25, 1975. PBGC replied with a request for information about the plan and the reasons for its dissolution. Avon made a timely reply to the correspondence, outlining its poor financial condition. On May 29, 1975, Avon's plan administrator advised an Avon vice-president, Thomas Rosser, that Avon should forward a waiver request to PBGC "by registered mail on May 30." PBGC did not receive the letter, dated June 5, until the tenth of June and refused to consider the waiver request. The Ouimet Group now asserts that it is entitled to consideration for a hardship waiver, contending that it had no knowledge that PBGC would waive liability only if a specific request were made. It contends that the June 15th letter "indicates no more than the diligence of the actuary, who became concerned about the absence of any action by PBGC." Our reading of the record leads us to the contrary conclusion. The letter from the company plan administrator to Rosser states:

> Enclosed is a draft of the letter I mentioned in our telephone conversation which should be forwarded on Company stationery to the PBGC by registered mail on May 30, to meet the 270 day period from September 2, 1974.

It indicates that Avon knew PBGC had instituted a waiver-request procedure. Whether Avon learned this formally or informally, it failed to act during the requisite time period. Avon correctly states that the statute requires no specific

request for a waiver; but, once it had knowledge of PBGC's housekeeping rules, it should have followed them. Moreover, as the district court pointed out, the Act allowed waiver by PBGC "for only the first 270 days" after enactment. 29 U.S.C. § 1304(f)(4). That period has passed.

Affirmed.

BOWNES, *Circuit Judge* (concurring specially). While I agree with the panel, I think its statutory analysis, like that of the district court, is incomplete. It glosses over, without addressing, the main statutory problem — that ERISA recognizes two groups of businesses: businesses (whether or not incorporated) which are under common control, and a controlled group of corporations. Each is defined separately and treated separately under the Act. Unfortunately, the parties and the district court, to some degree, have used the terms interchangeably. Since the key question is whether the single employer definition of businesses under common control under section 1301(b)[16] brings the Ouimet Group within the liability provisions of section 1362(a),[17] and, since section 1301 does not refer to controlled groups of corporations at all, it is

[16] 29 U.S.C. § 1301(b) provides in pertinent part:

> For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.

[17] 29 U.S.C. § 1362(a) provides in pertinent part: "This section applies to any employer who maintained a plan (other than a multiemployer plan) at the time it was terminated[.]."

necessary to examine the Act to determine how both entities are treated and into which category the Ouimet Group falls.

Congress defined controlled group by adopting the Internal Revenue Code definitions of 26 U.S.C. § 1563(a)[18] which make stock ownership the test. It did not, at the time it passed ERISA, define groups under common control in terms of any

[18] 29 U.S.C. § 1060(c) refers to 26 U.S.C. § 1563(a)(1)-(3) which contains the following definition of controlled group of corporations.

> (a) Controlled group of corporations.—For purposes of this part, the term "controlled group of corporations" means any group of—
>
> (1) Parent-subsidiary controlled group.—One or more chains of corporations connected through stock ownership with a common parent corporation if—
>
> (A) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations, except the common parent corporation, is owned (within the meaning of subsection (d)(1)) by one or more of the other corporations; and
>
> (B) the common parent corporation owns (within the meaning of subsection (d) (1) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations.
>
> (2) Brother-sister controlled group.—Two or more corporations if stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations is owned (within the meaning of subsection (d) (2)) by one person who is an individual, estate, or trust.
>
> (3) Combined group.—Three or more corporations each of which is a member of a group of corporations described in paragraph (1) or (2), and one of which—
>
> (A) is a common parent corporation included in a group of corporations described in paragraph (1), and also
>
> (B) is included in a group of corporations described in paragraph (2).

existing provisions of the Internal Revenue Code. In section 1301(b), it provided that, under regulations prescribed by PBGC, all employees with trades or businesses under common control are to be treated as employed by a single employer. It further directed that the PBGC regulations "shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26." The regulations promulgated by the Secretary of the Treasury *after* the enactment of ERISA under 26 U.S.C. § 414(c), *see* footnote 14, *supra*, defined groups under common control in the same terms as controlled groups. This, however, cannot change the separate treatment given these two entities under the Act.

The Ouimet Group fits into the definition of both entities; it is a group of businesses under common control and also a controlled group of corporations. The problem inherent in this dual role is that businesses under common control and a controlled group of corporations are not treated in the same manner throughout the Act.

That section defining a multiemployer plan states, "all corporations which are members of a controlled group of corporations . . . shall be deemed to be one employer." 29 U.S.C. § 1002(37)(B)(ii). There is no mention of trades or businesses under common control in this section of the Act. Multiemployer plans are exempted from the liability provisions of 29 U.S.C. § 1362(a). Liability is imposed under 29 U.S.C. § 1364(a) on "all employers who maintain a plan under which more than one employer makes contributions at the time such plan is terminated . . ." Since the plan here is not multiemployer and since Ouimet is a controlled group, it can be argued that only the employer (the bankrupts) who maintained the plan are liable.

For purposes of minimum participation, vesting and benefit accrual, a controlled group and businesses under common con-

trol receive separate but equal tandem treatment under 29 U.S.C. §§ 1060(c) and (d).[19]

Disparate treatment of these entities does not, however, eliminate the common control definition of employer from the liability section of the Act. I would hold specifically that where, as here, there is a controlled group of corporations that also meets the definition of businesses under common control, section 1301(b) makes the group a single employer for liability purposes under section 1362(a).

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[19] 29 U.S.C. §§ 1060(c) and (d) provide:

(c) For purposes of sections 1052, 1053, and 1054 of this title, all employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a) of Title 26, determined without regard to section 1563(a)(4) and (e)(3)(C) of Title 26) shall be treated as employed by a single employer. With respect to a plan adopted by more than one such corporation, the minimum funding standard of section 1082 of this title shall be determined as if all such employers were a single employer, and allocated to each employer in accordance with regulations prescribed by the Secretary of the Treasury.

(d) For purposes of sections 1052, 1053, and 1054 of this title, under regulations prescribed by the Secretary of the Treasury, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer. The regulations prescribed under this subsection shall be based on principles similar to the principles which apply in the case of subsection (c) of this section.

United States Court of Appeals
For the First Circuit

No. 79-1414.

PENSION BENEFIT GUARANTY CORPORATION, ET AL.,
PLAINTIFFS, APPELLEES,

v.

OUIMET CORPORATION, ET AL.,
DEFENDANTS, APPELLANTS.

JUDGMENT

Entered August 29, 1980

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ Dana H. Gallup.
Clerk.

United States District Court
District of Massachusetts

In re:
TENN-ERO CORPORATION,
AVON SOLE COMPANY,
Bankrupts
PENSION BENEFIT
GUARANTY CORPORATION,
Plaintiff

v.

Bankruptcy No.
75-1520-HL
No. 75-1521-HL

TENN-ERO CORPORATION,
AVON SOLE COMPANY and
HERBERT C. KAHN, Trustee,
Defendants

PENSION BENEFIT
GUARANTY CORPORATION

v.

Civil Action
No. 76-1314-T

OUIMET CORPORATION,
OUIMET STAY & LEATHER
COMPANY and OUIMET
WELTING COMPANY

Memorandum*

This opinion concerns itself with the possible liability of a bankrupt corporation, jointly and severally with its parent and brother-sister corporations, for pension underfunding pursuant to the Employee Retirement Income Security Act of 1974.

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*In *Pension Benefit Guaranty Corp.* v. *Ouimet Corp., et al*, C.A. No. 76-1314-T, this Memorandum constitutes the Master's Report and its Find-

Prior to 1975, the Avon Sole Company (Avon) engaged in the manufacture of shoe soling material in its plant in Massachusetts. In 1973 Avon formed Tenn-ERO Corporation (Tenn-ERO), a wholly owned subsidiary,[1] to manufacture soling material in a new plant in Tennessee. During its fiscal year ending September, 1974, Avon and Tenn-ERO (the Bankrupts) suffered consolidated operating losses of $800,000. Losses increased in the first quarter of 1975 and as a result management decided to discontinue manufacturing operations in Massachusetts. The Avon plant closed on March 25, 1975, but heavy losses continued, and on June 18, 1975 Avon and Tenn-ERO filed petitions in this Court pursuant to Chapter XI of the Bankruptcy Act, 11 U.S.C. § 701 *et seq.* Subsequently, on March 22, 1976, Avon and Tenn-ERO were adjudicated bankrupts.

At the time of the closing of the Massachusetts plant, Avon was a party to a pension plan agreement, dated May 4, 1959, covering its unionized employees, all of whom worked in the Massachusetts plant. Pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), P.L. 93-4006, 29 U.S.C. § 1001 *et seq*, Avon notified the Pension Benefit Guaranty Corporation (PBGC) of the impending discontinuance of operations in Massachusetts and the need to terminate the pension plan. Under ERISA the PBGC is charged with the administration of the pension plan termination process and the distribution of plan benefits after termination.[2]

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ings of Fact and Conclusions of Law are submitted to the District Judge for approval. The unusual procedural posture of this case is explained *infra*.

[1] Although separate in name, the companies were for all practical purposes one, and have so been treated by all parties throughout these proceedings.

[2] On April 20, 1976, the PBGC was appointed trustee of the Avon Sole Company Pension Plan pursuant to ERISA § 4041 by Judge Tauro of the U.S. District Court for the District of Massachusetts.

The PBGC filed a proof of claim in the bankruptcy proceeding of Avon and Tenn-ERO on February 6, 1976, claiming that pursuant to ERISA § 4062 the debtors were liable to the PBGC for an estimated $717,500.

Title IV of ERISA provides that upon the termination of a pension plan, the PBGC is to assume the plan's administration and, if necessary, to pay any guaranteed pension benefits if the plan itself has not been sufficiently funded to pay them. ERISA § 4062 provides that an employer who maintains an underfunded pension plan which terminates is liable to the PBGC for an amount that is either the deficit between the plan's guaranteed benefits and its assets (in other words, the out of pocket expense of the PBGC) or 30% of the employer's net worth, whichever is less.[3]

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[3] Liability of Employer

Sec. 4062. (a) This section applies to any employer who maintained a plan (other than a multiemployer plan) at the time it was terminated, but does not apply —

(1) to an employer who maintained a plan with respect to which he paid the annual premium described in section 4006(a)(B) for each of the 5 plan year during which the plan terminated unless the conditions imposed by the corporation on the payment of coverage under section 4023 do not permit such coverage to apply under the circumstances, or

(2) to the extent of any liability arising out of the insolvency of an insurance company with respect to an insurance contract.

(b) Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of —

(1) the excess of —

(A) the current value of the plan's benefits guaranteed under this title on the date of termination over

(B) the current value of the plan's assets allocable to such benefits on the date of termination, or

(2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

(c) For purposes of subsection (b)

(2) the net worth of an employer is —

In September, 1968, when Ouimet Corporation acquired the stock in Avon, the Avon pension plan had unfunded vested benefits in the amount of $92,000. In September, 1974, when ERISA became effective, the underfunding amounted to $606,929.53. On March 25, 1975, upon plan termination, the underfunding was reduced to $552,339.64.

The cause of the underfunding was basically three-fold. First, in 1959 when the plan was instituted participants were given credit for past years of service with Avon. So the plan owed benefits before contributions even began. Second, in 1969, pursuant to a collective bargaining agreement, automatic benefit increases were written into the plan and these had not been fully amortized by the date of termination. And third, the plan's assets had been invested in certain equity and

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(1) determined on whatever basis best reflects, in the determination of the corporation, the current status of the employer's operations and prospects at the time chosen for determining the net worth of the employer, and

(2) increased by the amount of any transfers of assets made by the employer determined by the corporation to be improper under the circumstances, including any such transfers which would be inappropriate under the Bankruptcy Act if the employer were the subject of a proceeding under that Act.

(d) For purposes of this section the following rules apply in the case of certain corporate reorganizations.

(1) If an employer ceases to exist by reason of a reorganization which involves a mere change in identity, form, or place of organization, however effected, a successor corporation resulting from such reorganization shall be treated as the employer to whom this section applies.

(2) If an employer ceases to exist by reason of a liquidation into a parent corporation, the parent corporation shall be treated as the employer to whom this section applies.

(3) If an employer ceases to exist by reason of a merger, consolidation, or division, the successor corporation or corporations shall be treated as the employer to whom this section applies.

(e) If an employer ceases operations at a facility in any location and, as a result of such cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment, the employer shall be treated with respect to that plan as if he were a substantial employer under a plan under which more than one employer makes contributions and the provisions of sections 4063, 4064, and 4065 shall apply.

fixed-income securities, and at the date of termination the market value of these securities was approximately $75,000 less than their costs. None of these factors, on its face, represented any illegal or improper conduct on the part of Avon. In fact, ERISA, recognizing that plan underfunding for reasons such as these would often be the case, provides for the amortization of past underfunding over a period of thirty to forty years. ERISA § 302. The reason the Avon pension plan terminated in an underfunded state in this case was because it terminated before amortization under ERISA was complete.

During February and March, 1976, the PBGC examined the books and records of the Bankrupts as well as those of certain related business enterprises — Ouimet Corporation, Ouimet Stay & Leather Company, Ouimet Welting Company and the Emil R. Ouimet Wareham Trust (collectively the Ouimet Group).

At all times relevant to this case, Ouimet Corporation owned 100% of the stock of Avon/Tenn-ERO. The Ouimet Stay & Leather Company owned 100% of the stock of Ouimet Welting Company and 50% of the stock of Brockton Plastics Company. Emil R. Ouimet owned in excess of 80% of the outstanding stock of Ouimet Corporation and the Ouimet Stay & Leather Company, and 100% of the stock of the Emil R. Ouimet Wareham Trust.[4]

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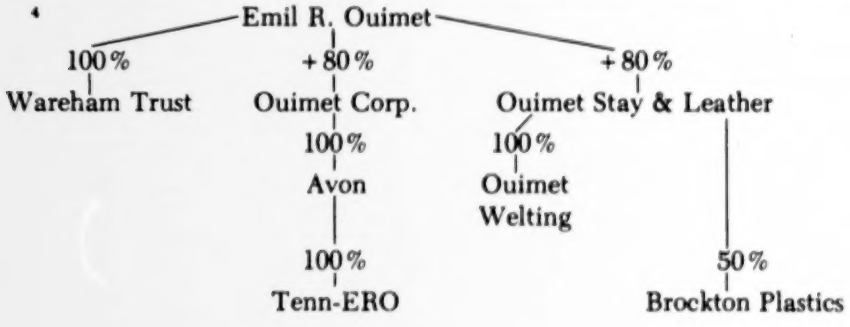
[4]



On March 15, 1976, the PBGC filed an amended proof of claim in the instant proceedings in the amount of $552,340 and based this figure on the treatment of the Ouimet Group as well as the Bankrupts as the plan employer for purposes of ERISA § 4062.

On March 22, 1976, Ouimet Corporation and Ouimet Stay & Leather Company filed proofs of claim in the Avon and Tenn-ERO bankruptcy proceeding alleging that if Ouimet Corporation and Ouimet Stay & Leather Company were held liable to the PBGC as a result of the Avon pension plan termination, they were subrogated to the rights of the PBGC against the Bankrupts. The Trustee in Bankruptcy filed a cross claim asserting that if the PBGC's claim against the Bankrupts were allowed, the estate had a right to collect from Ouimet Corporation and Ouimet Stay & Leather Company in the amount distributed to the PBGC. Ouimet Corporation and Ouimet Stay & Leather answered the cross claim with denials.

On March 31, 1976, the PBGC commenced a civil action against the Ouimet Group in the United States District Court, pursuant to ERISA § 4068(d), to collect the alleged § 4062 liability of the Ouimet Group. The PBGC then filed a complaint in the Bankruptcy Court seeking relief from the automatic stay in bankruptcy in order to proceed against the Bankrupts by joining them in the District Court action.

The procedural posture of the instant case embodies an objection by the Trustee in Bankruptcy to the PBGC's claim against the Bankrupts, the complaint filed by the PBGC in this Court seeking relief from the automatic stay of Bankruptcy Act § 11 and Rule 401 of the Rules of Bankruptcy Procedure, and a reference to this Court as Master in the U.S. District Court action of the PBGC against the Ouimet Group. The issues as well as the role of the Court in all these matters are substantially identical, and for purposes of convenience they

will be dealt with as a single proceeding to determine the validity and amount of any liability in connection with the termination of the Avon Sole Company Pension Plan.

Trial of this case began on October 19, 1976 and consumed all or part of twelve days. At least 257 pages of legal memoranda have been filed at various stages of the proceedings.

All counsel have labored diligently and competently in full recognition that this is a case of first impression, not only in this district, but, because of the novelty of the Act, in the United States. The case has important implications in bankruptcy administration as well as in the implementation of ERISA and the viability of certain concepts of corporate law.

ERISA provides for the payment to the PBGC for monies spent to pay benefits due from a terminated pension plan whose own assets were insufficient. Payment must come from the employer and the amount is limited so as not to exceed 30% of the employer's net worth. ERISA § 4062. It is conceded, and the Court so finds, that Avon and Tenn-ERO, the Bankrupts, had no positive net worth at the relevant date so that unless the Ouimet Group may be included as the responsible employer, the PBGC cannot recover any of its benefit expenditures. If the Ouimet Group is included as the employer, then the question of the meaning and proper application of the waiver provision of ERISA § 4004(f) must be resolved. Finally, if the Ouimet Group becomes part of the employer and waiver of liability is inappropriate, the net worth of the employer must be established in order to determine the propriety of the PBGC's claim.

I.

The Pension Benefit Guaranty Corporation is a "body corporate" in the U.S. Department of Labor, ERISA § 4002(a), and as such it is an agency within the meaning of

§ 2a of the Administrative Procedure Act (APA), 5 U.S.C. § 551. See also, Joint Explanatory Statement of the Committee of Conference, House Conference Report, No. 1280, 93rd Cong., 2d Sess. (1974). Because it involves the actions of an administrative agency, this case must be decided in light of the constraints existing both upon agency action and a court's examination of that action.

The framework for judicial review of agency action is supplied by APA § 10, 5 U.S.C. §§ 701, 702. That section affords a right of review to a person adversely affected by agency action "except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." The U.S. Supreme Court has enunciated the principle that only on a showing of "clear and convincing" intent to preclude court review should courts refuse to review agency action. *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Heikkila* v. *Barber*, 345 U.S. 229 (1953). Professor Davis argues that this statement of the Court is somewhat more extreme than is justified by the majority of Supreme Court cases in this area; however, even he defines the general rule of the Supreme Court as establishing a presumption of reviewability to be rebutted by showing either a contrary Congressional intent or the inappropriateness of judicial consideration. 4 K. Davis, *Administrative Law Treatise* §§ 28.08 and 28.16-1 (1958 and Supplements) (hereinafter cited as *Davis*). Professor Jaffe concurs in this presumption of reviewability. L. Jaffe, *Judicial Control of Administrative Action* at 336 and 372-3 (1965) (hereinafter cited as *Jaffe*).

Thus, in the instant case, a finding that ERISA fails to evidence a Congressional intent, express or implied, to preclude review, together with a finding that review is not inappropriate, are enough to justify judicial review under APA § 10.

In the case of ERISA, it is unnecessary to look beyond the words of the Act itself to determine the propriety of general court review. Title IV § 4003(f) provides that an employer adversely affected by any action of the PBGC may bring an action in the appropriate court.[5] In the instant case, the Bankrupts and the Ouimet Group, having been declared liable by the PBGC pursuant to ERISA § 4062, have clearly been adversely affected by an agency action and this Court may therefore examine the validity of the PBGC's action.

Once reviewability has been established, it is necessary to define the scope of that review.

The instant case involves the assessment by an administrative agency of a monetary liability based on factual findings obtained from examination of detailed and complicated financial data. At no time prior to the assessment were the original parties offered the opportunity to appear before the agency to explain their financial records or defend their positions. Therefore, before any liability may be finally determined, such a hearing is a constitutional necessity. *Bi-Metallic Co.* v. *Colorado*, 239 U.S. 441 (1915); *Londoner* v. *Denver*, 210 U.S. 373 (1908).

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[5] Actually, the express words of ERISA § 4003(f) are slightly confusing because of an apparent typographical error.

> Any participant, beneficiary, plan administrator, or *employee* adversely affected by any action of the corporation [PBGC] or by a receiver or trustee appointed by the corporation, with respect to a plan in which such participant, beneficiary, plan administrator or *employer* has an interest, may bring an action against the corporation, receiver or trustee in the appropriate court. (Emphasis added)

It is obvious that there is an error either in the word "employee" or "employer." Since § 3(7) of ERISA defines a "participant" to include an employee, to repeat that term would be purposeless. To include employers, however, would be totally consistent with the section's obvious intent to make court review available to all those who could suffer under Title IV. It would seem, therefore, that the error lies in the word "employee," which should read "employer." The PBGC, in open court, has concurred with this interpretation.

Professor Davis formulates this due process hearing requirement into an adjudicative/legislative dichotomy, saying that when an agency adjudicates facts a trial type hearing is required. 1 *Davis* § 7.04. Professor Jaffe speculates that categorization often confuses more than clarifies, but accepts the basic due process pronouncement:

> When a person is the object of an administrative order which will be enforced by a writ levying upon his property or person, he is at some point entitled to a judicial test of legality.

Jaffe at 384.

This is not to say, however, that the hearing must always occur at the agency level. So long as the aggrieved party is provided a *de novo* hearing prior to the enforcement of the agency action, the constitutional requisites have been met. *Nickey* v. *Mississippi*, 292 U.S. 393 (1934); *Phillips* v. *Commissioner*, 283 U.S. 589 (1931); *Hagar* v. *Reclamation District*, 111 U.S. 701 (1884). Thus, when an agency assessed a tax against an individual, the U.S. Supreme Court has held that the failure of the agency to provide the taxpayer a hearing prior to the assessment did not violate due process requirements because in order to actually enforce the assessment the agency had to resort to the courts at which time a full hearing occurred. *Hagar* v. *Reclamation District*, *supra*.

The instant case is similar to those in which the Supreme Court has held that *de novo* court review of agency action satisfies due process. The PBGC, without any prior evidentiary hearing, assessed a liability against the Bankrupts and the Ouimet Group. To enforce collection of that assessment the instant court action has been necessary. ERISA § 4068(d). Therefore, this Court, in offering all parties the opportunity to

present their cases, must consider the evidence presented *de novo*. *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594 (1950); *Lichter* v. *U.S.*, 334 U.S. 742 (1948); *Nickey* v. *Mississippi*, *supra*.

In light of the *de novo* hearing requirement, the Court's scope of review of the PBGC's action is fairly broad. To the extent necessary to its decision, the Court "shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of an agency action." APA § 10(c), 5 U.S.C. § 706. The Court shall set aside an agency action if it is, *inter alia*, arbitrary, capricious, contrary to constitutional right or "unwarranted by the facts to the extent that the facts are subject to a trial de novo by the reviewing court." *Id.*

The standards for this Court's scope of review must take into account that the agency has already acted, albeit without a hearing. Even the Court's *de novo* reception of evidence cannot ignore the agency's findings. Thus, unless the weight of the evidence presented in the *de novo* hearing supports a contrary finding, the Court must uphold the agency action. It is the burden of the aggrieved party to establish that the agency action complained of violates statutory or procedural requirements or is unwarranted according to the weight of the evidence. *Redman* v. *U.S.*, 507 F. 2d 1007 (5th Cir. 1975).

Further, as part of the consideration of its scope of review of the agency's interpretation of a statute, the Court takes note of the deference a judicial tribunal must extend to an administrative agency's specialized expertise. The rule is venerable that a reviewing court must give great weight to the interpretation of a statute by the agency charged with its administration. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973).

It is also well established, however, that the courts are the final authorities on the issue of statutory construction and as

such the courts are not bound by an administrative interpretation. Especially is this true when the agency interpretation creates internal statutory inconsistencies or is inconsistent with a statutory mandate, frustrates congressional policy or creates serious constitutional questions. *Morton* v. *Ruiz*, 415 U.S. 199 (1974); *Volkswagonwerk* v. *Federal Maritime Commission*, 390 U.S. 261 (1968); Annot. 39 L. Ed. 2d 942 (1975). The Court takes note in the instant case of the PBGC's youth and the consequent dearth of established agency policy and precedent that existed at the pertinent time in areas of its jurisdiction. To a certain extent this inexperience must discourage notions of agency expertise that are part of the justification for a court's deference. Furthermore, to the extent that the Court's review concerns the meaning of the words of a statute, for instance, the definition of the term "employer" or the scope of the waiver provision within ERISA, such questions are traditionally a matter of judicial competence and concern. *Jaffe* at 576 *et seq.*

II.

The liability which the PBGC asserts in this case arises out of the employer liability provisions of ERISA, specifically § 4062.

The PBGC claims that liability under ERISA § 4062 must be assessed not only against the Bankrupt, who was the actual employer, but also against the Ouimet Group because the term "employer" as used in § 4062 means all trades or businesses under common control within the terms of ERISA § 4001(b).[6] The PBGC apparently maintains that in light of

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[6]ERISA § 4001(b) states:

> An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is

ERISA § 4001(b), the term "employer" wherever it appears in Title IV of ERISA encompasses the control group concept.

In regulations promulgated by the PBGC pursuant to ERISA § 4001(b), the PBGC adopts the regulations issued by the Treasury Department under § 414(c) of the Internal Revenue Code. 29 C.F.R. § 26.12 (Supp. 1976). The Treasury Department defines "trade or business under common control" in Temp. Reg. 11.414(c). See also Proposed Regs. 1.414 *et seq*, CCH Fed. Tax Rept. para. 2669F.

The Treasury Regulations delineate three groups of business relationships as common control situations. The first two, parent-subsidiary and brother-sister, are self explanatory. The third, the combined group, consists of three or more businesses where each is a member of either a parent-subsidiary or brother-sister group and at least one is *both* the parent in a parent-subsidiary group and a member of a brother-sister group. The Regulation gives the following example: A, an individual, owns substantially all the stock of subsidiary ABC and DEF corporations. ABC owns substantially all the stock of subsidiary X corporation. A, ABC, X and DEF are members of a combined group since each is a member of either a parent-subsidiary or brother-sister group and ABC is both a parent in a parent-subsidiary group and a "sibling" in a brother-sister group.

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treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of the Internal Revenue Code of 1954. *For purposes of this title, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer.* The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of the Internal Revenue Code of 1954. (Emphasis added)

In the instant case the relationship of the entities places them in the combined group category of Temp. Treas. Reg. 11.414(c).

The PBGC concedes that unless the term "employer" in the liability provision of ERISA § 4062 is defined to include control group entities, the PBGC would not succeed in recouping any of the funds it may spend to pay benefits in the underfunded Avon Sole Company Pension Plan.

ERISA envisions that the PBGC will assume the administration and disbursement of a terminated pension plan whose assets are insufficient to cover all guaranteed benefits. ERISA further provides that within certain limits, the PBGC may recover from the former plan employer the funds it is forced to spend in funding the plan. The PBGC is never permitted to hold an employer liable for an amount in excess of 30% of the employer's net worth determined as of a date within 120 days of the plan termination. ERISA § 4062(b). The PBGC through its own valuation has concluded that the Bankrupts had no positive net worth on the net worth valuation date, December 31, 1974. Thus, if the employer under § 4062 is the Bankrupts alone, the PBGC recovers nothing and a dividend will be paid to the Bankrupts' creditors.

If, on the other hand, the employer consists of the Bankrupts and the Ouimet Group, the net worth valuation, at least according to the PBGC, increases to such a degree that PBGC claims it can recover the entire potential out of pocket expense of $552,339.64, and the creditors of the Bankrupt would not receive a dividend.[6]

The Bankrupts and the Ouimet Group, of course, strenuously argue that, for liability purposes under ERISA, only the Bankrupts are the employer. They further argue that even if

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[6]The bankrupt estate has assets of $374,000 and unsecured claims of $2,200,000. The PBGC's claim is given tax priority status, ERISA § 4068(b)(2), so that after costs of administration the PBGC's priority would exhaust the assets leaving nothing for the unsecured creditors.

the PBGC prevails as to the definition of "employer", ERISA § 4004(f)(4) requires that all liability in this case be waived. Finally, they contend that if unwaived liability does exist, under a proper calculation of net worth that liability is considerably less than that which the PBGC demands.[7]

Because ERISA has been law for such a short period, the courts have had little opportunity to interpret its manifold and complex provisions. This Court has been unable to discover any judicial decision relating to the extent of employer liability under ERISA § 4062.[8]

After careful examination of the express statutory language of ERISA, its legislative history and the public policies it is intended to advance, this Court is convinced that ERISA § 4062 levies liability for the PBGC's assumption of pension plan payments only against the person or corporation acting directly as

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[7] The PBGC, defining net worth in terms of fair market value and assigning a zero net worth to the Bankrupts, concludes that the net worth of the control group on the net worth valuation date was so great that 30% of that value is not exceeded by the entire $552,339.64 potential plan underfunding to be borne by the PBGC.

The Bankrupts and the Ouimet Group dispute the PBGC's conclusion. They variously contend that net worth is based on book value, that the net worth valuation date chosen by the PBGC was erroneous, that too many businesses were included in the control group and, even accepting the PBGC's position as to all of the aforementioned, that the Ouimet Group's net worth was far less than that calculated by the PBGC and that when the *negative* net worth of the Bankrupts is subtracted therefrom, the total net worth of the control group falls between $464,000 and $650,000 and that the liability is 30% of that net worth — an amount far less than $552,339.64.

[8] This situation is not likely to continue much longer. Congressman John Erlenborn, one intimately involved in the drafting and enactment of ERISA, in a recent speech before the Midwest Pension Conference, pointed to a host of problems associated with the employer liability provisions of ERISA. He suggested that, as they now exist, the employer liability provisions should be renamed the employer extermination provisions. This suggests the probability, as conglomerates attempt to clarify their potential liabilities, of future litigation and possibly Congressional action in this area.

an employer in relation to an employee benefit plan, or, as provided in § 4062(d), against certain successor in interest corporations when the direct plan employer attempts to avoid liability. In the instant case the employer for § 4062 purposes would be the Bankrupts.

This Cou t in the first instance is guided by the basic principle that a statute's plain language is the primary indicator of its meaning. *Massachusetts Financial Services, Inc.* v. *Securities Investors Protection Corp.*, 545 F. 2d 754 (1st Cir. 1976).

ERISA § 4062(a)-(c) establishes a formula for determining employer liability. § 4062(d) expands that liability in instances of certain corporate reorganizations. If, as the PBGC contends, ERISA § 4001(b) and its control group concept applies to ERISA § 4062, then § 4062(d)(2) becomes superfluous. Under control group theory a parent-subsidiary relationship would already create liability in both businesses, so that the subsequent merger of the subsidiary into the parent would not affect the parent's liability. And if the control group concept of § 4001(b) is extended to § 4062, not only would § 4062(d)(2) be superfluous, but its language would directly conflict with such concepts. § 4062(d)(2) speaks of an "employer" and its "parent." But under control group theory, the word "employer" already includes both a parent and subsidiary. No reading of § 4062(d)(2) can be reconciled with a simultaneous application of the control group concept.

It is an accepted principle of statutory interpretation that general provisions in one part of a statute must yield to specific provisions in another part. *MacEvoy v. U.S.*, 322 U.S. 102 (1943); *Baltimore National Bank v. State Tax Commissioner of Maryland*, 297 U.S. 209 (1936).

> Ascertainment of congressional intent with respect to the standard of liability created by a particular section . . .

> [of an act] . . . must therefore rest primarily on the language of that section.

Ernst & Ernst v. *Hochfelder*, 425 U.S. 185, 200 (1976). See also, *Santa Fe Industries, Inc.* v. *Green*, ____ U.S. ____, 45 U.S.L.W. 4317 (1977).

The inability to reconcile ERISA § 4001(b) with ERISA § 4062(d)(2) is but one support of the position that the § 4001 (b) control group reference was intended to apply to some section other than § 4062 and not as a general definition of "employer" in Title IV.

Indiscriminate application of control group theory throughout Title IV would torture the meaning of certain sections in that title. For example, under ERISA § 4004(e)(4) the PBGC is given the limited authority to waive an employer's liability in certain instances when "the employer was not able, as a practical matter, to continue the plan." It is obvious that the term "employer" in the above quote refers to the direct employer who is the only one who, as a practical matter, is or is not able to continue a plan. See also, ERISA §§ 4023(d), 4044(d)(1) and 4047.

An examination of the semantic structure of § 4001 reveals that while § 4001 is headed "Definitions" it is subdivided into a typical definition section and a section enunciating the control group concept. If the statute meant the word "employer" wherever it appeared in Title IV to include all trades or businesses under common control it would have included the term "employer" in § 4001(a) as a definition and defined it to apply throughout Title IV. Instead, the control group concept is separated in § 4001(b) and states in pertinent part:

> For purposes of this title, *under regulations prescribed by the corporation* [PBGC], all employees of trades or busi-

> ness . . . which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. (Emphasis added.)

The PBGC's regulations under ERISA § 4001(b) simply co-opt the Treasury Regulations under Internal Revenue Code § 414(c). See *supra*. They define the control group but do not establish the extent of its application in Title IV. Thus, at present, it is not known to what sections in Title IV the control group concept applies. If Congress had in mind the possibility of control group liability under § 4062, it left it to the PBGC to establish the proper application to that concept in light of all the various provisions in Title IV that would have to be considered in order to maintain consistency. In the interim, or permanently if the PBGC declined to promulgate regulations, the successor in interest provision of § 4062(d) would prevent intercorporate abuse of the pension insurance program.

Further support for the proposition that ERISA § 4062 employer liability does not comprehend the control group is the omission from Title IV of a provision for apportionment of employer liability. It is difficult to imagine that the draftors would provide for control group liability without also dealing with its apportionment. Judicial precedent on joint and several liability, if that is indeed the standard for apportionment, is neither well defined nor consistent.[9] Judicial efforts to apportion control group liability without statutory guidelines would result in inconsistency and unpredictability in a statutory scheme whose general comprehensiveness belies such a situation.

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[9] Compare, for example, *Lorimer* v. *Julius Knack Coal Co.*, 246 Mich. 214, 224 N.W. 362 (1929) with *United States Fidelity and Guaranty Co.* v. *Naylor*, 237 F. 314 (8th Cir. 1916).

In light of the ambiguity created by ERISA § 4001(b) and the unreasonable interpretation its wholesale application would bring to certain Title IV provisions, especially § 4062, the Court may resort to legislative history to assist its construction. *Massachusetts Financial Services, Inc.* v. *Securities Investors Protection Corp., supra.*

The policy justification for holding an employer liable for the termination of an underfunded pension plan has been frequently enunciated. The intention is to "preclude abuse by [the employer] shifting the financial burden to the plan termination insurance program [and the PBGC] despite the fact that the employer had available funds to continue funding the plan." House Education & Labor Committee Report, No. 533, 93rd Cong., 2d Sess. at 15 (1973). Put another way, the employer liability provision deters "unrealistic promises" by encouraging an employer considering a pension plan to carefully determine if he can afford it, because if he can't and it is terminated he will be liable for its underfunding. Senate Finance Committee Report, No. 383, 93rd Cong., 2d Sess. at 117 (1973).

The Report of the House-Senate Conference Committee, H. Rep. No. 1280, 93rd Cong., 2d Sess. (1973), is silent as to the policy behind the assessment of employer liability generally, but since the Conference version of ERISA retained the basic framework of employer liability provided in both the House and Senate versions, it is safe to assume that the House and Senate rationale was adopted. In discussions on the floors of both the House and Senate just prior to passage of ERISA the above stated policy was outlined in support of the employer liability provisions of the Conference bill. 120 Cong. Rec. H 1126 — H 1175 and S 15737 — S 15774 (1974).

In the early House and Senate versions of ERISA no mention is made of control group theory in the employer liability provisions. See, 3 U.S. Code Cong. & Admin. News 4639 *et seq*

(1974). On the other hand, in these versions, each contains the precursor to present § 4062(d). See, House Education & Labor Committee Report, No. 533, 93rd Cong., 2d Sess. (1973); Senate Labor & Public Welfare Committee Report, No. 127, 93rd Cong., 2d Sess. (1973); Senate Finance Committee Report, No. 303, 93rd Cong., 2d Sess. (1973). The Senate Finance Committee Report offers a clear explanation:

> Under the bill, a successor employer is treated as the employer to which the liability rules apply — whether the change has come about because of a reorganization which involves a mere change in identity, form, or place of organization, or by reason of a liquidation into a parent corporation, or by reason of a merger or consolidation. In other words, a potential liability cannot be avoided where the employer is bought out by another company and ceases to exist because it is merged into the other company.

S. Rep. No. 383, 93rd Cong., 2d Sess. at 118 (1973).

The legislative history of the control group concept of ERISA § 4001(b) is, unfortunately, not so clear. As has been stated, no comparable provision may be found in any version of ERISA prior to the House-Senate Conference's final draft.[10]

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[10] This fact in itself seems to present a serious obstacle to the assertion that control group theory applies to ERISA § 4062. 2 U.S.C. § 190C(a) states:

> In any case in which a disagreement to an amendment in the nature of a substitute has been referred to conferees, it shall be in order for the conferees to report a substitute on the same subject matter; *but they may not include in the report matter not committed to them by either House.* They may, however, include in their report in any such case matter which is a germane modification of subjects in disagreement. (Emphasis added.)

In the Joint Explanation of the Committee on Conference accompanying the final draft of ERISA, under the section headed "Employer Liability", the Conference Committee describes the liability provision and states that in determining the employer who may be liable, all trades or businesses under common control are to be treated as a single employer. H. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. at 169 (1974). No mention is made of the successor in interest provision [now § 4062(d)]. In light of the inconsistency between the two provisions, it is possible that the Conference Committee intended to substitute control group liability for successor in interest liability, but this is unknown. What is known is that the successor in interest provision remains in § 4062 while the control group provision has found its way into the opening section of Title IV thus apparently rendering the Conference Committee's above-cited comment dubious.

The express purpose for requiring employer liability in case of termination of an underfunded pension plan, and the logical purpose as well, is to discourage employers, irresponsible or malicious, from establishing pension benefits more generous than they can afford to fund or from terminating plans which they can afford to maintain, knowing that the PBGC stands ready to take up the plan administration.[11] In this light the successor in interest provisions of § 4062(d) close an obvious loophole — overextension of plan benefits, unjustified termination and then pro forma corporate reorganization to escape liability. The control group concept, on the other hand, not only doesn't advance the purpose of ERISA

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[11] The employer liability provisions of ERISA are not intended as a primary revenue raising measure for the PBGC who has to pay the pension benefits of underfunded plans. Under ERISA § 4006, the PBGC is to prescribe insurance premiums to be paid periodically by all plan employers "to provide sufficient revenues to the . . . [PBGC fund] . . . to carry out its functions under this title."

§ 4062, it may impede it. A solvent employer who knows it will be held liable if its pension plan terminates in an underfunded state will strive for a fiscally responsible plan. Query: whether the same incentive exists for an employer who knows that in certain situations its liability may be assumed by its parent and even sister corporations, the latter possibly with a deeper pocket yet in any business sense often completely unrelated to the employer.

The legislative history of ERISA points to one further basis upon which to rest a finding that ERISA § 4062 does not comprehend control group liability, namely, that the drafters did not intend to assess plan termination liability against an insolvent employer.

Early drafts of ERISA contain specific provision limiting employer liability to solvent employers. 3 U.S. Code Cong. & Admin. News 4664 and 4879 (1974). See also, House Education & Labor Committee Report, *supra*, § 405; Senate Labor & Public Welfare Committee Report, *supra*, § 405.

Although the enacted version of ERISA contains no specific prerequisite of solvency prior to assessment of employer liability, the spirit of that provision lingers in the present § 4062 in its limitation of liability to a percentage of net worth. It may very well have been that the express provision applying employer liability to solvent employers was deleted because the limitation of liability to 30% of net worth was felt to accomplish the same result. An insolvent company by definition would have little or no net worth and thus little or no termination liability.

Despite the fact that there is no express statement limiting employer liability to solvent employers, remarks made on the floors of both houses of Congress during debate on the final version of ERISA indicate that such a limitation should be implied.

> Obviously the purpose of plan termination insurance is to protect the participants and beneficiaries from any loss of benefits and where the employer contributing to the plan which terminates is insolvent, there is no claim against the employer for the amount of funds expended by the [PBGC].

120 Cong. Rec. H1137 (1974) (remarks of Congressman Gaydos).

> Since there would be a possibility of abuse by solvent employers who terminate a plan and shift the financial burden to the insurance program notwithstanding their own financial ability to continue funding such plan, the Conference Bill imposes liability on employers whose plans terminate . . .

120 Cong. Rec. S15740 (1974) (remarks of Senator Williams). See also, Comment, *The Employee Retirement Income Security Act of 1974: Policies and Problems*, 26 Syracuse L.R. 539 at 552 (1975).

The concept of control group liability advocated by the PBGC is inconsistent with ERISA's policy of limiting liability to solvent employers. No better example of this fact exists than the case at bar in which the PBGC asserts liability against the Bankrupts as part of the control group which would result in exhausting the bankruptcy estate and depriving the unsecured creditors of any dividend, when it admittedly could make no such assertion against the Bankrupts alone.[12]

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[12] It may be posited that this last argument against control group liability is not really broad enough and merely supports the removal of the insolvent

In light of the Bankruptcy Act policy of ratable distribution of a bankrupt's property to his creditors, is it reasonable to assume that unsecured creditors who provide credit on the basis of a borrower-employer's financial condition, when in the case of a solvent borrower-employer they would normally be subject to a loss no greater than 30% of the borrower's net worth on termination of an underfunded pension plan, now, because the borrower is bankrupt, would not only suffer severe losses as a result of the bankruptcy but would lose even the small bankruptcy dividend because the dumping of the bankrupt into a control group creates an unanticipated liability that completely consumes the bankruptcy estate?

Congress was aware of the Bankruptcy Act when it drafted and passed ERISA. For example, ERISA § 4068(b)(2) provides that an employer's liability for underfunded plan termination be treated for bankruptcy priority purposes as a tax due and owing to the United States. Congress appeared to be aware of the difference that would result in cases of the bankruptcy of the terminating employer and expressly provided that in such cases where net worth would not be an appropriate measure of the ERISA liability that the PBGC claim be given tax claim priority. See also, ERISA § 4042.

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employers from the control group and the assessment of liability against the solvent remainder. Such a position would be ludicrous and points up more clearly the inapplicability of control group concepts to the employer liability provisions of ERISA. To absolve the insolvent employer directly responsible for the underfunded plan and the one solely to whom the policies behind liability apply, but to indiscriminately hold liable its corporate relatives, is to completely ignore elementary tenets of business incorporation. It may be that in a given situation the interrelatedness of the corporate entities mandates some sort of control group liability upon entities other than the terminating employer. Such situations would be susceptible to control group theory through the regulations that ERISA § 4001(b) requires of the PBGC, and in any case are often covered by ERISA § 4062(d).

Before presuming a construction of ERISA that alters long established bankruptcy policy, an unequivocal expression of Congressional intent to do so should be evident. All that is evident in fact is that Congress intended to give the ERISA claim a priority status not to appropriate the entire estate by the unrestricted use of the control group concept.

In light of the express statutory language, the legislative history and its policies, this Court believes that when ERISA provides for liability to be borne by an employer whose pension plan has terminated in an underfunded state, that employer must be the direct employer and not some stranger to the plan beneficiaries who becomes the employer through control group theory. In the instant case the employer for purposes of ERISA § 4062 are the Bankrupts, the Avon Sole Company and its wholly owned subsidiary Tenn-ERO Corporation.

III.

Assuming arguendo, that for purposes of employer liability under ERISA § 4062, control group theory does apply and thus in the instant case, since the control group has some positive net worth, a liability may be assessed, that liability would still be subject to possible waiver under ERISA § 4004(f).[13]

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[13] ERISA § 4004(f) provides:

> In addition to its other powers under this title, for only the first 270 days after the date of enactment of this Act the corporation may—
>
> (1) contract for printing without regard to the provisions of chapter 5 of title 44, United States Code,
>
> (2) waive any notice required under this title if the corporation finds that a waiver is necessary or appropriate,
>
> (3) extend the 90-day period referred to in section 4041(a) for an additional 90 days without the agreement of the plan administrator and without application to a court as required under section 4041(d), and

An employer with potential liability for termination under ERISA § 4062 may escape liability if the plan is terminated (1) within the first 270 days after enactment of ERISA, (2) the employer as a practical matter could not continue the plan, and (3) an assessment of liability would result in unreasonable hardship to that employer. ERISA § 4004(f)(4).

The PBGC argues that the Bankrupts and the Ouimet Group are not eligible for liability waiver under § 4004(f)(4) because, although the plan terminated within the 270 day period, a waiver of liability was not requested within that 270 day period. A requirement that the employer request waiver within the 270 day period is nowhere a part of § 4004(f), nor is its implication logical, equitable or consistent with the obvious intent of the section to alleviate hardship in certain cases of plan termination during the first nine months of ERISA's operation. It is conceivable, for instance, that in accordance with ERISA §§ 4042 and 4048(2), the PBGC's termination of a plan could have occurred on the 270th day of the 270 day period. ERISA § 4004(f)(4) cannot be read to preclude an employer, who may otherwise be eligible, from seeking waiver of liability merely because it failed to so request within the few hours or minutes remaining of the 270th day.

Assuming then, that liability existed in this case and, since the Avon Sole Company Pension Plan terminated during the 270 day period, that those liable would be eligible for waiver of liability, it would remain to be determined whether the other criteria for waiver under ERISA § 4004(f)(4), namely, undue hardship and impracticality of continuation, have been

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(4) waive the application of the provisions of sections 4062, 4063, and 4064 to, or reduce the liability imposed under such sections on, any employer with respect to a plan terminating during that 270 day period if the corporation determines that such waiver or reduction is necessary to avoid unreasonable hardship in any case in which the employer was not able, as a practical matter, to continue the plan.

satisfied. Since the statutory scheme seems to have left this determination to the discretion of the PBGC, the Court in the first instance would feel compelled to defer to the agency for such findings.

Thus, in the event that control group theory applied to ERISA § 4062 on liability, before that liability could be finally approved by a Court, the PBGC would have to consider and decide the possibility of waiver in accordance with ERISA § 4004(f)(4).

IV.

The instant case has been decided without a judgment of liability against any of the parties defendant. It should be pointed out, however, that a contrary conclusion on the definition of "employer" in ERISA § 4062 and a finding of some employer liability, would cause to surface doubt as to the constitutionality of ERISA § 4062.

Prior to the enactment of ERISA, no law existed that required pension plans to be fully funded, that is, to be able to pay all vested benefits if the plan were to suddenly terminate. Employers were constrained only by whatever annual contribution requirements they may have contracted for in a plan or collective bargaining agreement, and if they claimed an income tax deduction for plan contributions, by the requirements of the Internal Revenue Code. None of these constraints required full funding and one of the prime functions of ERISA was to introduce this requirement. Statement of President Gerald R. Ford upon signing ERISA, September 2, 1974. ERISA generally requires all plan funding from the effective date onward to be adequate to cover current liabilities *and* if the plan dates from before the Act and is underfunded, amortization of that past liability over a period of years. ERISA § 302. It is to advance this objective that ERISA § 4062 makes

a monetary assessment on an employer whose terminated plan is underfunded.

But in a case where a pension plan is underfunded because it was established prior to ERISA, when the law in no way prohibited underfunding, to subsequently hold the employer liable for this innocent past act is a retroactive application of the law that may violate the Fifth Amendment to the U.S. Constitution, and possibly Article I section 10 as well. *Darlington, Inc.* v. *Federal Housing Administration*, 142 F. Supp. 341 (E.D. S.C. 1956) rev'd on other grounds 352 U.S. 977 (1957); C. Hockman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L.R. 692 (1960).

It is well established that retroactive liability is not alone sufficient to void an act on constitutional grounds. The retroactivity must be irrational or otherwise violative of due process. *Usery* v. *Turner Elkhorn Mining Co.*, 49 L. Ed.2d 752 (1976). In *Usery*, a recent and definitive case on this issue, Justice Marshall, writing for the Supreme Court, sets forth certain factors to be considered in determining the constitutionality of a retrospective law. It is in light of these factors that the constitutional doubts arise in the instant case.

ERISA contains no transition period after its enactment during which employer liability is not assessed.[14] *Usery*, *supra*, at 763. Its liability provision to a great extent is founded on considerations of deterrence and blameworthiness,[15] yet the *Usery* Court held that in order to justify retroactive imposition of liability on grounds of deterrence or blameworthiness, it should be shown that, had the retroactive law in fact been in existence all along, those sought to be held liable would have still failed to comply. *Usery*, *supra*, at 767, citing *Welch* v.

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[14] The waiver provison of ERISA § 4004(f)(4) could assume this role but for the extremely narrow interpretation given it by the PBGC.

[15] See discussion of legislative history, *supra*.

Henry, 305 U.S. 134 (1938). In the instant case this translates into a showing that, had there always been a law against inadequate pension plan funding, Avon would nevertheless have continued to underfund its plan. The PBGC has made no such showing, nor in all probability could it. Furthermore, any attempt to justify ERISA liability as the *Usery* Court justified the statute in that case, namely, as a device to spread costs to employers who have profited by the fruits of their employees' labor, *Usery*, *supra*, at 768, fails in light of the attempted imposition of liability on entities like sister corporations having no relation whatever to the Avon pension plan, its underfunding or its beneficiaries.

And finally, the Supreme Court in *Usery*, after upholding the retroactive legislation in that case, specifically distinguishes that situation from one similar to the instant case. The Court points out that the legislation in question in *Usery* related to a specific need created by dangerous working conditions saying that retroactive legislation relating to pension benefits and the need to supplement a former employee's salary may not be constitutional. *Usery*, *supra*, at 768-9, citing *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935).

The potential constitutional infirmity of ERISA § 4062 grows larger if, as the PBGC asserts, the retroactive liability is imposed not only on the direct plan employer, but on related entities in the control group. The related entities, never mind whether or not the pension plan's underfunding was legal at the time, may have had no control whatever, or even knowledge, of the plan underfunding. Cf. *State* v. *A.S. Nye Kristianberg*, 84 F. Supp. 775 (D.C. Md. 1949).

In the instant case the Ouimet Group had no employer-employee relationship with the pension beneficiaries. It could not compel the Bankrupts to make benefit contributions, control labor contracts or influence the pension fund investments,

whose subsequent depreciation in value partly accounted for the plan underfunding.

And of course the creditors relied, as they had a right to, on the balance sheets of the companies that would not and could not reflect ERISA liability magnified by a control group concept.

The potential constitutional infirmity brought about by interpreting ERISA § 4062 to include control group concepts militates strongly against such an interpretation. It is a "cardinal principle" that a statutory construction inconsistent with the Constitution be avoided if an alternative, consistent construction may be ascertained. *Pernell* v. *Southall Realty*, 416 U.S. 363, 365 (1974).

Internal conflicts and constitutional questions are eliminated or greatly reduced while the act remains consistent with its legislative history and avoids a disruption of the traditional rights of unsecured creditors if in the instant case the control group concept is not used as a definition of employer for purposes of liability under § 4062.

In light of the foregoing, it is this Court's conclusion, pursuant to Title IV of ERISA, that liability for the terminated underfunded Avon Sole Company Pension Plan exists solely with the actual employers, namely, the Bankrupts, the Avon Sole Company and Tenn-ERO Corporation, and that because the Bankrupts had no positive net worth on the net worth valuation date, there is no liability pursuant to ERISA § 4062. It is unnecessary to further prolong these findings by considering the issue of the actual net worth of the control group.

In its role as a Court of Bankruptcy, the PBGC's request for relief from the automatic stay in bankruptcy is denied and its claim against the Bankrupts is disallowed.

In its role as Special Master, the above findings of fact and conclusions of law are submitted for approval of the District

Court and a decision in favor of the Defendants, in C.A. No. 76-1314-T, is recommended.

Dated at Boston, in said District, this 13th day of May, 1977.

HAROLD LAVIEN
Bankruptcy Judge and Special Master

United States District Court
District of Massachusetts

In re:
TENN-ERO CORPORATION,
AVON SOLE COMPANY,
Bankrupts
PENSION BENEFIT
GUARANTY CORPORATION,
Plaintiff

v.

Bankruptcy No.
75-1520-HL
No. 75-1521-HL

TENN-ERO CORPORATION,
AVON SOLE COMPANY and
HERBERT C. KAHN, Trustee,
Defendants

ORDER

In accordance with the Court's Memorandum of May 13th 1977, it is

ORDERED

That the claim of the Pension Benefit Guaranty Corporation in the above-captioned case is disallowed, and it is further

ORDERED

That relief from the automatic stay is denied. No action shall be brought seeking to enforce against the Bankrupts any liability under the Employee Retirement Income Security Act in any court other than the Bankruptcy Court.

Entered at Boston, in said District, this 13th day of May, 1977.

HAROLD LAVIEN
Bankruptcy Judge

No. 80-860

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

OUIMET CORPORATION, OUIMET STAY & LEATHER COMPANY, OUIMET WELTING COMPANY, EMIL R. OUIMET WAREHAM TRUST, AVON SOLE COMPANY, TENN-ERO CORPORATION and HERBERT KAHN, TRUSTEE,

Petitioners,

vs.

PENSION BENEFIT GUARANTY CORPORATION and UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, SOLOMON REDDIX and ALEX WILLIAMS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENT PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Pension Benefit Guaranty Corporation ("PBGC") may recover from all members of a group of trades or businesses under common control statutory reimbursement for the insufficiency arising from the termination of a pension plan subject to Title IV of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA").

2. Whether the application of employer liability provisions in Title IV of ERISA, 29 U.S.C. § 1362, to a pension plan terminated before December 31, 1975, is constitutional.

3. Whether the PBGC was required to consider a request for waiver of liability under Title IV of ERISA which was filed and received after the expiration of a statutory 270-day period during which the agency was authorized to grant such exemptions.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-860

OUIMET CORPORATION, OUIMET STAY & LEATHER COMPANY, OUIMET WELTING COMPANY, EMIL R. OUIMET WAREHAM TRUST, AVON SOLE COMPANY, TENN-ERO CORPORATION and HERBERT KAHN, TRUSTEE,

Petitioners,

vs.

PENSION BENEFIT GUARANTY CORPORATION and UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, SOLOMON REDDIX and ALEX WILLIAMS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENT PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 630 F.2d 4. The opinion of the district court is reported at 470 F.Supp. 945.

JURISDICTION

The decision of the court of appeals was issued on August 29, 1980. The petition for writ of certiorari was filed on November 27, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent sections of Title IV of ERISA involved in this case appear in the Appendix, pp. 1a-8a, *infra.*

STATEMENT

This case concerns a pension plan instituted in 1959 by Avon Sole Company ("Avon"), a Massachusetts shoe-sole manufacturing concern which went out of business in 1975, six-and-one-half years after it was purchased by Ouimet Corporation. At all relevant times, more than eighty percent of Ouimet Corporation's stock was held by Emil R. Ouimet, a Massachusetts resident who entered the business of manufacturing shoe parts more than forty years ago. The principal issue relates to whether Ouimet Corporation and other entities owned or controlled by Mr. Ouimet apart from Avon itself are liable to the Pension Benefit Guaranty Corporation ("PBGC") for the amount by which benefits statutorily guaranteed under Avon's pension plan exceeded the available assets of the pension fund at the time the pension plan was terminated. The question arises in the context of Avon's discontinuance of its manufacturing operations in March 1975 and its subsequent adjudication of bankruptcy.

1. The Pension Plan's Assets

Avon's pension plan was underfunded from the time it was first instituted, largely because credit was immediately given for employees' past years of service with no contribution having been made to provide for such credit (App. 103).[1] It continued to be underfunded in the following years, and by the time Ouimet Corporation purchased Avon in 1968, the fund was carrying approximately $92,000 in unfunded vested benefits (App. 102). The terms of the pension plan were known to Mr. Ouimet when the 1968 transaction was consummated (Supp. App. 213-214).

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[1] "App." refers to the Joint Appendix filed in the Court of Appeals. "Supp. App." refers to the Joint Supplemental Appendix in that court.

After Ouimet purchased Avon, management appointed by Mr. Ouimet participated in labor negotiations with representatives of the Avon employees. In the course of these negotiations, benefit increases were agreed upon. These increases were, however, not fully funded by the time of the plan's termination (App. 23, 103, 226-227).

Avon was exclusively responsible for funding the benefits promised under the agreement. It had full control over the rate at which money was accumulated to pay pensions and determined the pension fund's investments (App. 45-46, 103-104, 245; Supp. App. 224-225). Certain investments made by the fund resulted in a decrease in the market value of the fund's assets (App. 103). As of September 30, 1974, Avon's pension fund deficit—*i.e.*, its unfunded vested pension liabilities—had grown to $552,082 (Supp. App. 40).

When Avon ceased its operations in March 1975, the value of guaranteed pension benefits was $935,448, but the plan had only $383,108 in assets allocable to such benefits (App. 105). In addition, there were approximately $150,000 of vested severance benefits which are not guaranteed under federal law, and this amount has never been paid (App. 77; Supp. App. 152-153).

2. The Interrelationship Among the Petitioners

The petitioners in this case are Avon, four other business corporations, and a Massachusetts trust.[2] Besides Avon, they are the following:

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[2] The case, in its present posture, is a consolidation of a bankruptcy proceeding instituted in 1975 by petitions filed by Avon and its subsidiary Tenn-ERO Corporation (District Court Nos. 75-1520-HL and 75-1521-HL) and the civil suit instituted by the PBGC on April 2, 1976, together with an amended complaint, separately numbered, filed on July 16, 1976 (District Court Nos. 76-1314-T and 77-2005-T). Although the caption on the district court opinion contains only the numbers of the civil suit, it is clear that both proceedings were decided by the district court and

(a) *Tenn-ERO Corporation.*—A Massachusetts corporation which is a wholly owned subsidiary of Avon, formed in 1972 to operate a non-union plant in Tennessee. Tenn-ERO filed a Chapter XI bankruptcy petition in June 1975 simultaneously with Avon.

(b) *Ouimet Corporation.*—A Delaware corporation which owns all the stock of Avon. More than 90 percent of this corporation's stock is owned by Emil R. Ouimet (App. 49).

(c) *Ouimet Stay & Leather Company.*—A corporation engaged in the manufacture of shoe trim and shoe strippings which was originally purchased by Emil R. Ouimet in 1940 (Supp. App. 160). Eighty percent of the company's stock is controlled by Mr. Ouimet (App. 49).

(d) *Ouimet Welting Company.*—A wholly owned dormant subsidiary of Ouimet Stay & Leather Company (App. 49), which is no longer engaged in manufacture.

(e) *The Emil R. Ouimet Wareham Trust*—A trust which owns the land on which the offices of Ouimet Stay & Leather are located (Supp. App. 164-165).[3]

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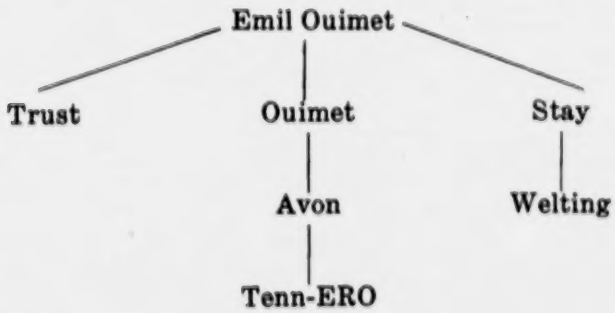
were before the court of appeals. Since Avon and Tenn-ERO are petitioners in this court (and they are parties *only* in the bankruptcy proceedings), the petitioners apparently are treating the proceedings as having been consolidated.

[3] The interrelationship of the various entities is shown on the following chart which was, in slightly different form, incorporated in the opinions of the bankruptcy judge and the district court:



Although each of these corporations and the trust, along with Avon, conducted its own day-to-day business, Emil Ouimet and his son Richard were the principal officers of all (App. 48). Emil Ouimet selected or approved the key operating personnel of all the companies and made all significant financial and policy decisions (Supp. App. 161, 167-169, 178-179, 200, 229-231). Professional and sales resources were also shared among the various entities (Supp. App. 166, 169, 174-176, 192-194, 219-220, 230).

The entities' finances were also intertwined. Ouimet Corporation guaranteed the obligations of Avon and of Tenn-ERO, Avon's subsidiary (Supp. App. 12-13). Mr. Ouimet also forestalled Avon's bankruptcy by personally paying $230,000 to one demanding creditor (Supp. App. 209, 220). In addition, Ouimet corporations frequently utilized, as needed, each other's available cash (Supp. App. 176-177).[4]

Consolidated federal tax returns were filed by Ouimet Corporation and its subsidiaries, Avon and Tenn-ERO (App. 47). The entire group of companies paid federal income taxes as a commonly controlled group (Supp. App. 69-126).[5]

3. The Proceedings Below

When Avon decided, in March 1975, to terminate its operations, it notified the PBGC as required by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* ("ERISA"), of the impending termination of its pension plan (App. 54). Almost three months after closing its doors, in June 1975, Avon and Tenn-

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[4] The companies' financial interrelationship was indicated by references in various of the financial statements. See Supp. App. 5, 11-14, 18, 24, 26-27, 44, 46, 52, 216-218.

[5] One company which was initially named by the PBGC but was subsequently excluded by stipulation was Brockton Plastics Corporation (App. 183).

ERO filed bankruptcy petitions in the United States District Court for the District of Massachusetts (App. 28).

In February 1976, the PBGC initially advised Avon that it was liable for an estimated $717,500 underfunding of its pension plan, and it filed a proof of claim in that amount with the bankruptcy court (App. 71). In the course of a subsequent investigation, the PBGC requested and received information concerning the other petitioners (App. 124). On the basis of this more complete investigation, the PBGC filed an amended proof of claim in the bankruptcy court on March 15, 1976, in the amount of $552,340 (App. 11-14). It also alleged that Avon was one of a group of affiliated companies which were jointly liable for the pension plan's deficit (App. 12). The PBGC sent demands to each of the affiliated corporations (App. 72-80). On March 22, 1976, Avon objected to the PBGC's amended claim (App. 20-22), and Ouimet Corporation and Ouimet Stay & Leather Company also filed an objection to the PBGC's claim (App. 23-25).

On March 22, 1976, Avon was judicially declared bankrupt (App. 122), and on April 2, 1976, the PBGC instituted the present proceeding against three of the Ouimet corporations in the United States District Court for the District of Massachusetts pursuant to Section 4003(e)(3) of ERISA, 29 U.S.C. § 1303(e)(3). The PBGC requested a judgment directing the petitioners to pay the PBGC $552,339.64 plus interest in satisfaction of their liability under Section 4062(b) and (c) of ERISA, 29 U.S.C. § 1362(b) and (c) (App. 151-155). Thereafter, on July 15, 1976, the PBGC determined that the Ouimet Trust should also be treated as an employer and joined it as a defendant (App. 156-157).

The district court appointed the Bankruptcy Judge as a special master to take evidence and make proposed findings and conclusions (App. 162-163). This order

effectively consolidated the bankruptcy proceedings and the PBGC's civil suit for disposition. *See* note 2, *supra*. Following twelve days of hearings, proposed findings and conclusions were issued by the special master on May 13, 1977, recommending that Avon and Tenn-ERO alone be held liable for the underfunded pension plan (Pet. App.[6] 22a-52a).

The PBGC sought modification of the master's report and moved for partial summary judgment before the district court. On March 2, 1979, the district judge (Tauro, J.) granted the PBGC's motion for partial summary judgment.[7] The district judge reasoned that the language of Section 4001(b) of ERISA, 29 U.S.C. § 1301(b), which provides for treatment as a "single employer" of the employers of "all employees of trades or businesses (whether or not incorporated) which are under common control," governs liabilities under Section 4062(b) of ERISA, 29 U.S.C. § 1362(b). The court concluded (470 F.Supp. at 949):

> [W]hen one member of a controlled group terminates an underfunded pension plan, the entire group may be held liable by the PBGC for purposes of reimbursement under section 1362 . . . .

The district judge then certified his entry of partial summary judgment for interlocutory appeal under 28 U.S.C. § 1292(b) (App. 220). The court of appeals thereafter affirmed. It held that the "Ouimet Group," being under the common control of Emil R. Ouimet,

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[6] "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari.

[7] The opinion of the district court is reported at 470 F.Supp. 945 (D. Mass. 1979).

should be treated as one employer for the purpose of 29 U.S.C. § 1362. The court said (Pet. App. 13a):

> We are not persuaded that, because only one of a group of corporations under common control contributes to a plan, it is unjust to make the group responsible for the plan's deficit. The facts of this case illustrate why such a group should be treated as an integrated whole. Ouimet purchased Avon with full knowledge of the plan and its funding requirements. Ouimet participated in the labor negotiations resulting in greater pension benefits that contributed to the deficit. The Ouimet group filed a consolidated tax return on which the Avon contributions were deducted. We see nothing unfair in treating the Ouimet Group as a single employer.

Relying upon this Court's decision in *Nachman Corporation* v. *Pension Benefit Guaranty Corporation*, 100 S. Ct. 1723 (1980), the court of appeals also rejected petitioners' claims that Title IV of ERISA did not apply to plans terminated lawfully before December 31, 1975 (Pet. App. 14a). And relying upon the constitutional ruling of the Court of Appeals for the Seventh Circuit in the *Nachman* case (592 F.2d 947), as to which this Court had denied certiorari (442 U.S. 940) and which this Court appeared to approve by liberal quotation in its *Nachman* opinion (100 S.Ct. at 1729, n. 12), the court of appeals rejected petitioners' constitutional challenge to Title IV's imposition of employer liability (Pet. App. 11a-15a).

ARGUMENT

1. Section 4062 of ERISA, 29 U.S.C. § 1362, governs the liability of an employer to the PBGC on termination of its pension plan, and Section 4068 of ERISA, 29 U.S.C. § 1368, establishes the specific means by which the PBGC may collect amounts due under the law. Both courts below agreed with the PBGC that the definition of the term "employer" provided in Section 4001(b) of ERISA, 29 U.S.C. § 1301(b), governs the meaning of the word as used in the liability provisions of Section 4062 and 4068, 29 U.S.C. §§ 1362 and 1368. This conclusion is supported by the plain language of the law and by its policies, as shown in its legislative history.

(a) *Plain language.*—Title IV of ERISA, designated "Plan Termination Insurance," includes *all* the provisions subsequently codified in 29 U.S.C. §§ 1301-1368 (as well as several amendments to the Internal Revenue Code). Section 4001(b) of ERISA, 29 U.S.C. § 1301(b), provides, in pertinent part (Pet. 4; emphasis added):

> *For purposes of this title*, under regulations prescribed by the [PBGC], all employees of trades or businesses (whether or not incorporated) *which are under common control* shall be treated as employed by a single employer and *all such trades and businesses as a single employer.*

The "title" so specified includes the provisions authorizing the PBGC to demand and sue for pension plan deficits. Thus the "common control" standard of Section 4001(b) of ERISA, 29 U.S.C. § 1301(b), governs this action brought by the PBGC. Since all the petitioners are concededly "under common control," [8] the PBGC properly brought its collection action against all of them.

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[8] The petitioners contended in the district court that the Ouimet Wareham Trust was not a member of the controlled group, but that issue was resolved against them by the district judge (470

(b) *Policies of the Act.*—Imposing appropriate liability on employers who terminate their pension plans is an essential element of the statutory scheme contemplated by ERISA. It was clear to the architects of the 1974 law that it would defeat ERISA's remedial objectives if employers could, without suffering adverse economic consequences, terminate underfunded pension plans,[9] thereby causing employees to lose benefits not statutorily guaranteed and leaving the PGBC to make up the shortfall in guaranteed benefits. *See, e.g.*, remark of Congressman Erleborn, 120 *Cong. Rec.* H1140 (February 26, 1974) ("I do not think insurance will work without employer liability. . . ."); Statement of Senator Williams, 120 *Cong. Rec.* 15737, 15740 (August 22, 1974); H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 16 (1973); S.Rep. No. 93-383, 93d Cong., 1st Sess. 26 (1973).

Employer liability for underfunded pension plan terminations is essential to the achievement of the objectives of Title IV of ERISA. The prospect of liability encourages employers to continue their plans by deterring terminations of underfunded plans. If such terminations were not adequately discouraged, they would, in sufficient volume, destroy the program. That there would be such volume is inevitable, because termination without liability means the employer could transfer liabilities to PBGC without cost. The burden of each underfunded termination not reimbursed by the plan sponsor raises the premiums paid by all plans. The cumulative effects of a large number of underfunded plan terminations would raise these premiums to unacceptable levels. In addition,

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F.Supp. at 948-49). The issue was apparently abandoned by petitioners on appeal and has not been presented in the petition for a writ of certiorari.

[9] For purposes of this brief, an underfunded plan is one in which the assets are not sufficient to pay benefits guaranteed by PBGC under Title IV of ERISA.

underfunded terminations deprive employees of anticipated benefits beyond those guaranteed by Title IV of ERISA.

Imposing liability on all entities in a controlled group was Congress' method for preventing evasion of statutory liability through the manipulation of closely related business enterprises. The House Report made this clear when, in discussing liability under 29 U.S.C. § 1362, it specifically referred to the language of 29 U.S.C. § 1301(b) (H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 376 (1974)):

> In determining the employer who may be liable for insurance coverage losses of the [PBGC], all trades or businesses (whether or not incorporated) under common control are to be treated as a single employer. Trades or businesses under common control may, for this purpose, include partnerships and proprietorships as well as corporations.[10]

The decision of the courts below was, therefore, mandated by the language of the governing Act and by its legislative history. It was, in addition, consistent with the interpretation of the agency which has the statutory authority to administer the law and which was given jurisdiction, under Section 4001 of ERISA, 29 U.S.C. § 1301, to issue regulations further defining entities under "common control." *See, e.g., Environmental Protection Agency* v. *National Crushed Stone Ass'n*, No. 79-770, 49 U.S.L.W. 4008, 4013 (Dec. 2, 1980); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). And this interpretation is also consistent and coextensive, as 29 U.S.C. § 1301(b) re-

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[10] The House Committee made the same point in its discussion of 29 U.S.C. § 1364 (H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 380 (1974)):

> In this regard, it should be noted that the affiliated employer rules are to apply in this area. That is, if one member of an affiliated group has employer liability, then that liability is to extend to the entire affiliated group.

quires, with the regulations issued by the Secretary of the Treasury under the Internal Revenue Code with regard to "commonly controlled trades or businesses" under Section 414(a) of the Internal Revenue Code. *See Treas. Reg.* § 11.414(c)-2, reproduced in note 14 of the opinion of the court of appeals (Pet. App. 9a). Since there is no conflict of decisions on this issue, there is plainly no basis for review by this Court of the principal issue litigated below.

2. The first question presented in the petition appears to seek a determination of the constitutional issue which this Court specifically excluded from its grant of certiorari in *Nachman Corporation* v. *Pension Benefit Guaranty Corporation*, 442 U.S. 940 (1979). This issue still does not deserve review.

Petitioners claim that in sustaining the constitutionality of the termination liability provisions of ERISA, as applied to Avon, the decision of the court below was in conflict with this Court's decisions in *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935), and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978) (Pet. 11-18). There is, in fact, no conflict. The court of appeals properly relied upon *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 14 (1976), in rejecting petitioners' claims.

First, this Court's rulings in *Alton* and *Allied* are both distinguishable because the statutes at issue in both cases imposed liability upon employers to provide further compensation "for services long since rendered and fully compensated . . . ." *Alton*, 295 U.S. at 354; *see also Allied*, 438 U.S. at 246-47. The termination insurance and liability provisions of ERISA, on the other hand, like the black-lung compensation statute involved in the *Turner Elkhorn* case, operate "not simply to increase or supplement a former employee's salary," but rather "to allocate to the [employer] an actual, measurable cost of his busi-

ness." *Turner Elkhorn*, 428 U.S. at 19. The employer defined by 29 U.S.C. § 1301(b) can never be liable for more than the benefits that have vested under the terms of the pension plan. In every case, then, the employer has already benefitted from the requisite number of years of service from an employee necessary to vest rights under the pension plan. ERISA ensures that employers do not evade their responsibilities for guaranteed pension rights by terminating underfunded plans.

Second, Congress in enacting Title IV of ERISA sought to remedy what it "perceived [as] a widespread problem of national importance." *Nachman Corporation* v. *Pension Benefit Guaranty Corporation*, 592 F.2d 947, 961 (7th Cir. 1979), *aff'd*, 100 S.Ct. 1723 (1980). This contrasts with the absence of such overriding objectives in the cases cited by petitioners.[11]

The Courts of Appeals have consistently held that this application of ERISA is constitutional, and other Circuits, including the court below, have approved the distinctions of the *Alton* and *Allied* cases on which the Court

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[11] ERISA, unlike the Minnesota statute invalidated in *Allied*, contains provisions "revealing the congressional attempt to moderate the impact of the liability imposed." *Nachman Corporation* v. *Pension Benefit Guaranty Corporation*, 592 F.2d at 962. *See, e.g.*, 29 U.S.C. § 1362(b) (limiting employer's liability in underfunded termination to 30% of its net worth); 29 U.S.C. § 1304(f)(4) (waiver of employer liability within 270 days of enactment permitted "to avoid unreasonable hardship"); 29 U.S.C. § 1367 (PBGC may allow "equitable and appropriate" deferred payment of employer liability). Petitioners contend that the court of appeals "disregards" this distinction by refusing to give employers "time to adjust to th[e] 'novel' concept" of PBGC recovery from all members of a group of trades or businesses under common control. Pet. 17-18. The provisions for adjustment to employer liability referred to above are, of course, applicable to petitioners. No reason is advanced why it was unreasonable for Congress to omit special, additional phase-in provisions for members of the class of employers to which petitioners belong.

of Appeals for the Seventh Circuit relied in its *Nachman* opinion. 592 F.2d at 958-963. *See In re Williamsport Milk Products Company, Inc. Retirement Plan for Salaried Employees*, 631 F.2d 726 (3d Cir. 1980); *A-T-O, Inc.* v. *Pension Benefit Guaranty Corporation*, No. 78-3269, Slip Op. at 21-27 (6th Cir. Nov. 12, 1980). The constitutional challenge has been uniformly rejected, and it does not warrant consideration by this Court.

3. A final issue raised by the petition is whether the PBGC erroneously refused to grant a waiver of liability under 29 U.S.C. § 1304(f)(4) (Pet. 24-25). The statute authorizes the issuance of a waiver "for *only* the first 270 days after September 2, 1974" (emphasis added). Although its actuarial consultant advised Avon to request such a waiver before May 30, 1975—when the 270-day period would expire—and although that firm drafted a letter for that purpose, Avon did not submit such a request within the deadline. Avon's waiver request, dated June 5, 1975, was received nine days after the deadline expired, and the PBGC concluded that it had no statutory authority to grant a waiver after the 270-day period (App. 46, 64-66, 68-70). The decision on which petitioners rely in this portion of their petition, *A-T-O, Inc.* v. *Pension Benefit Guaranty Corporation*, 456 F.Supp. 545 (N.D. Ohio 1978), was reversed on November 12, 1980, by the Court of Appeals for the Sixth Circuit. *A-T-O, Inc.* v. *Pension Benefit Guaranty Corporation*, No. 78-3269 Slip Op. (6th Cir. Nov. 12, 1980). The Sixth Circuit held that a waiver was appropriate under 29 U.S.C. § 1304(f)(4) "only if the employer can demonstrate unreasonable economic harm." Slip Op. at 20. The issue of timeliness of a waiver application was not, in any event, involved in the *A-T-O* case. On the waiver-of-liability question, therefore, the decision below was correct and, in any event, it presents no issue deserving review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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January 1981

APPENDIX

APPENDIX

The Pertinent Sections of Title IV of ERISA, 29 U.S.C. §§ 1301 *et seq.*:

§ 1301. Definitions

* * * *

(b) An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of title 26.

§ 1303. Operation of corporation

* * * *

(e) Civil actions by corporations; jurisdiction; process; expeditious handling of case; costs

* * * *

(3) The district courts of the United States shall have jurisdiction of actions brought by the corporation under this subchapter without regard to the amount in controversy in any such action.

§ 1304. Temporary authority for initial period

* * * *

(f) Additional corporate powers during 270-day initial period

In addition to its other powers under this subchapter, for only the first 270 days after September 2, 1974, the corporation may—

* * * *

(4) waive the application of the provisions of sections 1362, 1363, and 1364 of this title to, or reduce the liability imposed under such sections on, any employer with respect to a plan terminating during that 270 day period if the corporation determines that such waiver or reduction is necessary to avoid unreasonable hardship in any case in which the employer was not able, as a practical matter, to continue the plan.

§ 1362. Liability of employer

(a) Employers covered

This section applies to any employer who maintained a plan (other than a multiemployer plan) at the time it was terminated, but does not apply—

(1) to an employer who maintained a plan with respect to which he paid the annual premium described in section 1306(a)(2)(B) of this title for each of the 5 plan years immediately preceding the plan year during which the plan terminated unless the conditions imposed by the corporation on the payment of coverage under section 1323 of this title do not permit such coverage to apply under the circumstances, or

(2) to the extent of any liability arising out of the insolvency of an insurance company with respect to an insurance contract.

(b) Amount of liability

Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of—

(1) the excess of—

(A) the current value of the plan's benefits guaranteed under this subchapter on the date of termination over

(B) the current value of the plan's assets allocable to such benefits on the date of termination, or

(2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

(c) Net worth of employer

For purposes of subsection (b) (2) of this section the net worth of an employer is—

(1) determined on whatever basis best reflects, in the determination of the corporation, the current status of the employer's operations and prospects at the time chosen for determining the net worth of the employer, and

(2) increased by the amount of any transfers of assets made by the employer determined by the corporation to be improper under the circumstances, including any such transfer which would be inappropriate under the Bankruptcy Act [11 U.S.C. 1 et seq.] if the employer were the subject of a proceeding under that Act.

(d) Corporate reorganizations

For purposes of this section the following rules apply in the case of certain corporate reorganizations:

(1) If an employer ceases to exist by reason of a reorganization which involves a mere change in identity, form, or place of organization resulting from such reorganization shall be treated as the employer to whom this section applies.

(2) If an employer ceases to exist by reason of a liquidation into a parent corporation, the partent corporation shall be treated as the employer to whom this section applies.

(3) If an employer ceases to exist by reason of a merger, consolidation, or division, the successor corporation or corporations shall be treated as the employer to whom this section applies.

(e) Cessation of operations at one facility

If an employer ceases operations at a facility in any location and, as a result of such cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment, the employer shall be treated with respect to that plan as if he were a substantial employer under a plan under which more than one employer makes contributions and the provisions of sections 1363, 1364, and 1365 of this title shall apply.

§ 1364. Liability of employers on termination of plan maintained by more than one employer

(a) This section applies to all employers who maintain a plan under which more than one employer makes contributions at the time such plan is terminated, or who, at any time within the 5 plan years preceding the date of termination made contributions under the plan.

(b) The corporation shall determine the liability of each such employer in a manner consistent with section 1362 of this title except that the amount of the liability determined under section 1362(b)(1) of this title with respect to the entire plan shall be allocated to each employer by multiplying such amounts by a fraction—

(1) the numerator of which is the amount required to be contributed to the plan by each employer for the last 5 plan years ending prior to the termination, and

(2) the denominator of which is the total amount required to be contributed to the plan by all such employers for such last 5 years,

and the liimtation described in section 1362(b)(2) of this title shall be applied separately to each employer. The corporation may also determine the liability of each such employer on any other equitable basis prescribed by the corporation in regulations.

§ 1368. Lien for liability of employer

(a) Creation of lien

If any employer or employers liable to the corporation under section 1362, 1363, or 1364 of this title neglect or refuse to pay, after demand, the amount of such liability (including interest), there shall be a lien in favor of the corporation upon all property and rights of property, whether real or personal, belonging to such employer or employers.

(b) Term of lien

The lien imposed by subsection (a) of this section arises on the date of termination of a plan, and continues until the liability imposed under section 1362,

1363, or 1364 of this title is satisfied or becomes unenforceable by reason of lapse of time.

(c) Priority

(1) Except as otherwise provided under this section, the priority of the lien imposed under subsection (a) of this section shall be determined in the same manner as under section 6323 of title 26. Such section 6323 shall be applied by substituting "lien imposed by section 4068 of the Employee Retirement Income Security Act of 1974" for "lien imposed by section 6321"; "corporation" for "Secretary or his delegate"; "employer liability lien" for 't'ax lien"; "employer" for "taxpayer"; "lien arising under section 4068(a) of the Employee Retirement Income Security Act of 1974" for "assessment of the tax"; and "payment of the loan value is made to the corporation" for "satisfaction of a levy pursuant to section 6332(b)"; each place such terms appear.

(2) In the case of bankruutcy or insolvency proceedings, the lien imposed under subsection (a) of this section shall be treated in the same manner as a tax due and owing to the United States for purposes of the Bankruptcy Act [11 U.S.C. 1 et seq.] or section 191 of title 31.

(3) For purposes of applying section 6323(a) of title 26 to determine the priority between the lien imposed under subsection (a) of this section and a Federal tax lien, each lien shall be treated as a judgment lien arising as of the time notice of such lien is filed.

(4) For purposes of this subsection, notice of the lien imposed by subsection (a) of this section shall be filed in the same manner as under section 6323 (f) and (g) of title 26.

(d) Civil action; limitation period

(1) In any case where there has been a refusal or neglect to pay the liability imposed under section 1362, 1363, or 1364 of this title, the corporation may bring civil action in a district court of the United States to enforce the lien of the corporation under this section with respect to such liability or to subject any property, of whatever nature, of the employer, or in which he has any right, title, or interest to the payment of such liability.

(2) The liability imposed by section 1362, 1363, or 1364 of this title may be collected by a proceeding in court if the proceeding is commenced within 6 years after the date upon which the plan was terminated or prior to the expiration of any period for collection agreed upon in writing by the corporation and the employer before the expiration of such 6-year period. The period of limitations provided under this paragraph shall be suspended for the period the assets of the employer are in the control or custody of any court of the United States, or of any State, or of the District of Columbia, and for 6 months thereafter, and for any period during which the employer is outside the United States if such period of absence is for a continuous period of at least 6 months.

(e) Release or subordination

If the corporation determines, with the consent of the board of directors, that release of the lien or subordination of the lien to any other creditor of the employer or employers would not adversely affect the collection of the liability imposed under section 1362, 1363, or 1364 of this title, or that the amount realizable by the corporation from the property to which the lien attaches will ultimately be increased

by such release or subordination, and that the ultimate collection of the liability will be facilitated by such release or subordination, the corporation may issue a certificate of release or subordination of the lien with respect to such property, or any part thereof.

No. 80-860

In The

Supreme Court of the United States

October Term, 1980

OUIMET CORPORATION, OUIMET STAY & LEATHER COMPANY, OUIMET WELTING COMPANY, EMIL R. OUIMET WAREHAM TRUST, AVON SOLE COMPANY, TENN-ERO CORPORATION and HERBERT KAHN, *Trustee,*
Petitioners,

vs.

PENSION BENEFIT GUARANTY CORPORATION and UNITED RUBBER, CORK, LINOLEUM and PLASTIC WORKERS OF AMERICA, SOLOMON REDDIX and ALEX WILLIAMS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR URW, REDDIX AND WILLIAMS

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QUESTIONS PRESENTED

1. Whether 29 U.S.C. §1301(b) makes all trades or businesses under common control a single employer for purposes of Title IV of the Employee Retirement Income Security Act of 1974?

2. Whether the Pension Benefit Guaranty Corporation abused its discretion under 29 U.S.C. §1304(f)(4) in refusing to consider a liability waiver request made after May 30, 1975?

3. Whether controlled group liability for the value of guaranteed pension benefits under 29 U.S.C. §1362, in Title IV of the Employee Retirement Income Security Act of 1974, violates the Fifth Amendment to the United States Constitution?

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No. 80-860

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

OUIMET CORPORATION, OUIMET STAY & LEATHER COMPANY, OUIMET WELTING COMPANY, EMIL R. OUIMET WAREHAM TRUST, AVON SOLE COMPANY, TENN-ERO CORPORATION and HERBERT KAHN, TRUSTEE,

PETITIONERS,

vs.

PENSION BENEFIT GUARANTY CORPORATION AND UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, SOLOMON REDDIX AND ALEX WILLIAMS,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF IN OPPOSITION FOR URW, REDDIX AND WILLIAMS

STATEMENT OF THE CASE

For the sake of brevity, Respondents United Rubber, Cork, Linoleum and Plastic Workers of America (herein called "URW"), Reddix and Williams adopt the statement of Respondent Pension Benefit Guaranty Corporation (herein called "PBGC"). The facts are also detailed in the opinion of the Court of Appeals for the First Circuit (Pet. App. 1a-20a).

In 1959, Avon Sole Company and two unions representing its hourly employees instituted a pension plan by collective bargaining agreement and this plan was continued in effect by succeeding agreements.

After 1968, URW represented the production employees of Avon. Reddix and Williams are retired employees who earned vested rights to pensions under the plan and who presently receive monthly bene-

fits from PBGC as trustee for the plan, in amounts guaranteed by ERISA.

In February 1975, after enactment of ERISA and Title IV's effective date of September 2, 1974, URW and Avon entered into a supplemental collective bargaining agreement that renewed and revised the pension plan agreement, extending its term to July 1, 1975, unless renegotiated. Avon notified PBGC that the plan would be terminated on March 25, 1975 and PBGC agreed to the date.

On the termination date guaranteed vested benefits were underfunded by $552,339.64. The plan's assets would have paid only about 40% of its guaranteed benefit liabilities. Without the PBGC guaranty, average monthly pension benefits to former Avon employees or their beneficiaries would fall from $85.00 to $35.00. If there were no

guaranty, Reddix would lose 74.3% of his present monthly benefits and for Williams the loss would be total.

Avon and its wholly-owned subsidiary Tenn-ERO, both affiliates of the Ouimet Group, were ajudicated bankrupts on March 22, 1976.

ARGUMENT

Title IV of ERISA enacted a program for insuring unfunded vested benefits on plan termination; established the Pension Benefit Guaranty Corporation (PBGC) to administer the program; provided for its financing through employer contributions; and required employers to reimburse PBGC for the cost of unfunded guaranteed benefits in an amount not to exceed 30% of their net worth. 29 U.S.C. §§1321, 1322, 1362.

In the definitions section of Title IV, Congress took over from the Internal Revenue Code the controlled group concept, treating all business under common control as a "single employer." 29 U.S.C. §1301. This concept was expressly incorporated into 29 U.S.C. §1301(b), "for purposes of [Title IV of ERISA], under regulations prescribed by the [PBGC]."

On an interlocutory appeal heard under 28 U.S.C. §1292(b) the court of appeals affirmed the ruling of the district court that Ouimet, Trust, Stay, Welting and Avon/Tenn-ERO constituted a group under common control for purposes of Title IV of ERISA and, particularly, the section dealing with employer liability on plan termination, 29 U.S.C. §1362(b).

Petitioners do not dispute that the Ouimet Group consists of trade or businesses under common control as defined in temporary Treasury regulations promulgated under 26 U.S.C. §141(c). Temp. Treas. Reg. §11.414(c). These regulations were incorporated into PBGC's own regulation on the subject. 29 C.F.R. §2612.1-3.

Petitioners contend that the statutory provision which defines as a "single employer" all trades or businesses under

common control does not mean what it says. They argue that the provision lays down no definition but merely a special rule, that the reading of the court of appeals runs counter to the language of the statute and its legislative history, and that it imposes liability on bankrupt corporations contrary to the 30% net worth limitation in 29 U.S.C. §1362(b).

None of these arguments raises any question meriting review by this Court. The statutory provision does define the term "employer" for purposes of Title IV. As stated in the Conference Report on the bill that became ERISA, Congress intended that termination liability should apply to the entire controlled group. H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 376, 380, (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 5038, 5159. This means that the 30% net worth limit is

calculated on the basis of the net assets of the whole group, rather than any single one of its affiliates.

Congress enacted §1301(b) to prevent employers from using corporate compartmentalization to avoid termination liability. Such liability serves the declared policies of Title IV's termination insurance program by encouraging the continuance and maintenance of private pension plans, by providing for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under covered plans, and by maintaining PBGC premiums at the lowest level consistent with its obligations. 29 U.S.C. §1302(a).

All of petitioners' arguments were carefully considered by the district court and court of appeals. They were properly rejected on the basis of the

language of the statute, its legislative history, and the applicable regulations. Such decisions were clearly correct. There is no conflict in the circuits. The question of construing §1301(b) was important for advancing the ultimate termination of this case. That task was well performed below. There is no need for this Court to replough the same ground.

2. For the first 270 days after the enactment of ERISA, PBGC had authority to waive or reduce termination liability where "necessary to avoid unreasonable hardship." 29 U.S.C. §1304(f). The power of the PBGC to grant emergency relief expired on May 30, 1975. Although Avon had earlier been advised by its plan administrator to make a waiver request by the deadline date, it neglected to do so until too late. PBGC, which received the waiver request on June

10, 1975, refused to consider it because it was untimely.

The court of appeals ruled that Avon did have knowledge that PBGC had instituted a waiver-request procedure and that PBGC's authority to grant a waiver had expired before it received Avon's request.

The A-T-O decision cited by petitioners (Pet. 24) has been reversed on appeal. A-T-O v. PBGC, 318 Pens. Rep. (BNA) D-1 (Nov. 24, 1980).

In view of the facts and the terms of the statute, the decision of the court of appeals was manifestly right. Further review is not warranted.

3. Notwithstanding the finding that there was a negligent failure to seek a timely waiver of liability on grounds of unreasonable hardship, petitioners challenge on due process grounds the

retroactive imposition of liability on members of the controlled group. The Court should refuse to consider this constitutional question.

First, the decision below was rendered on an appeal from an interlocutory order. The district court had remanded the case to the bankruptcy court for determination of the net worth of the controlled group and for apportionment of the liability among the members of the Ouimet Group. This has not yet been done. Until net worth has been established and apportionment accomplished, it is not possible to ascertain the impact of controlled group liability upon solvent or insolvent affiliates of the group or upon their creditors. Without a complete factual record depicting such impact, this Court should avoid consideration of the constitutional question as premature.

Second, if retroactivity alone is the issue, then the question is no different for members of a controlled group than it is for unaffiliated businesses. The Court refused to consider that constitutional issue in Nachman Corp. v. Pension Benefit Guaranty Corp., 442 U.S. 940 (1980). Moreover, in resolving the statutory question on Nachman, this Court recognized that ERISA necessarily has a retroactive impact and it quoted with approval the conclusion of the Seventh Circuit Court of Appeals that "Congress had adequately tempered the Act's burdens on employers and that those burdens were sufficiently justified by the public purposes supporting the legislation." U.S. , 100 S. Ct. 1723 (1980).

The court below followed the Seventh Circuit's decision in Nachman, 592 F.2d

947 (7th Cir. 1979). In rejecting petitioner's constitutional challenge, it relied on Usery v. Turner Elkhorn Mining Co., 482 U.S. 1 (1976) upholding the constitutionality of a statute requiring the payment of benefits to miners with black lung disease who had left the industry before the effective date of the act. Acknowledging the act's retroactive effect, the Court in Usery found no lack of due process:

> "But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations...
>
> This is true even though the effect of the legislation is to impose a new duty or liability based on past events..." 482 U.S. 1, 16.

Neither Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935) nor Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) is controlling

here. Alton is an outmoded precedent founded on the doctrine of substantive due process. Both Alton and Allied deal with statutes quite different from ERISA. Title IV of ERISA imposes carefully limited termination liability on employers only with respect to employees whose right to a pension had already vested under a pension plan. Moreover, as the Court noted in Nachman, in enacting ERISA Congress "adequately tempered the Act's burdens on employers."

There is no conflict among the circuits on the question of constitutionality. The Third and Sixth Circuits have joined the Seventh Circuit in upholding the constitutionality of employer termination liability under ERISA. In re Williamsport Milk Products Company, Inc. Retirement Plan, 309 Pens. Rep. (BNA) A-16 (3d Cir. Aug. 29, 1980); A-T-O v. PBGC, supra.

Consequently, this Court should decline to review petitioners' claim of unconstitutionality.

CONCLUSION

The petition for a writ of certiorari should be denied.

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